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In The
Supreme Court of the United States

LEN WALLACE, et al.,

Petitioners,

v.

STATE OF MONTANA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI APPENDIX VOLUME II

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BRUCE BUHMANN, SHIRLEY BUHMANN, CIRCLE EAGLE GAME FARM, LEN WALLACE, PAMELA WALLACE, and BIG VELVET RANCH, Plaintiffs, v. THE STATE OF MONTANA, MIKE McGRATH, and JEFF HAGENER, Defendants, SPORTSMENT [sic] FOR I-145 [sic] and MONTANA WILDLIFE FEDERATION, Defendant-Intervenors.	Cause No. ADV-2002-555 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** (Filed May 2, 2005)

This cause came on for trial without a jury on November 30, 2004. The trial was limited to the question of whether Defendants are liable under the Fifth Amendment of the United States Constitution and the Montana Constitution, Article II, section 29, for an uncompensated taking of Plaintiffs' property resulting from the enactment and enforcement of Initiative Measure 143 (hereinafter I-143). Plaintiffs (hereinafter "Wallaces" and "Buhmanns") were represented by Arthur V. Wittich and Richard M. Stephens,

and Defendants (hereinafter State) were represented by Chris D. Tweeten, Chief Civil Counsel, Office of the Attorney General. Intervenors were represented by Sarah K. McMillan.

The following witnesses testified: Bruce Buhmann; Len Wallace; Richard Clough, wildlife consultant; Jeff Hagener, Director of Montana Department of Fish Wildlife and Parks; Evaleen Starkel, administrative assistant for the Montana Department of Livestock; Thomas F. T. Linfield, Montana State Veterinarian; H. Frank Houle, veterinarian and brucellosis epidemiologist; John Mundinger, wildlife biologist/consultant; Peter Nickerson, Ph.D., economist; Tim Feldner, manager of the commercial wildlife program for FWP; James Posewitz, fish and wildlife biologist; Dr. Valerius Geist, retired professor of environmental science; David Stalling, employee of Trout Unlimited and member of Sportsmen for I-143; Zdenek Petran, veterinarian and manager of the Animal Health Program in Calgary, Alberta; and Terry L. Anderson, Ph.D., Executive Director, Property and Environmental Research Center (by deposition).

At the close of trial, the Court indicated that another short hearing would be scheduled if the Court had questions about the evidence. Because of the attorneys' effective examinations and arguments, the Court does not need another hearing.

The deposition testimony of Dr. Anderson was transcribed and has been marked as Exhibit 39 for

purposes of reference. The Court has ruled on the objections made during the deposition and has noted the rulings in the deposition transcript.

Counsel made substantive motions during the trial. Rulings on those motions are subsumed in the Court's Conclusions of Law.

From the testimony and evidence presented, the Court makes the following Findings of Fact, which reflect the Court's determination of the credibility of witnesses and the weight of the evidence presented, and Conclusions of Law in which the pertinent law has been applied to the relevant facts:

STATEMENT OF AGREED FACTS (FROM PRE-TRIAL ORDER)

1. The Buhmanns reside in Blaine County, Montana, where they owned and operated the Circle Eagle Game Farm for elk breeding.

2. The Wallaces moved to Ravalli County, Montana, in 1991 and purchased 3,800 acres formerly known as the Rye Creek Ranch out of bankruptcy from Citizens State Bank. Thereafter, Len Wallace established a private elk ranch on the property, which he later named the Big Velvet Ranch.

3. Such private elk ranch operations were and are regulated by the State of Montana, through the Montana Department of Fish Wildlife and Parks and the Montana Department of Livestock. Privately

owned elk have been and still are considered alternative livestock under Montana law.

4. The Wallaces obtained their first state license for the Big Velvet Ranch in 1992, after completing all necessary state reviews and approvals. Their licenses were amended several times, after state review and approval.

5. Since 1917 to date, it has been lawful for individuals to own elk, deer and bison and to keep them in captivity. When the Wallaces began the Big Velvet Ranch, it was lawful in the state to privately own animals such as elk, deer and bison, and to charge customers a fee to shoot any animal they wished.

6. On November 7, 2000, the voters of Montana passed I-143, which prohibited (1) the issuance of new alternative livestock licenses; (2) the shooting of animals for a fee, and (3) the transfer of existing alternative livestock licenses.

7. Alternative livestock owners filed a class action lawsuit in federal district court in 2001 to enjoin the State from enforcing the fee-shooting prohibition under I-143. The class plaintiffs' request for a preliminary injunction was denied, and thereafter they voluntarily dismissed the case without prejudice.

8. Some alternative livestock operators obtained an injunction against the State in a state district court in northeastern Montana, preventing the State from interpreting I-143 as prohibiting the sale of live

animals for later shooting by the buyer. The Montana Supreme Court vacated the injunction, holding that I-143 prohibited the "sale of live animals for later shooting."

9. The Wallaces were prohibited from selling their animals for eventual shooting by clients, without public compensation.

10. Presently there is no live test for Chronic Wasting Disease (CWD). The only effective test requires removal of the animal's brain tissue, which can only be accomplished after the animal is dead.

FINDINGS OF FACT

1. I-143 enacted two changes in the statutes that gave rise to this lawsuit. It enacted an amendment to Section 87-4-412(2), MCA, to make it read as follows, with the new language underlined:

> (2) The licensee may acquire, breed, grow, keep, pursue, handle, harvest, use, sell, or dispose of the alternative livestock and their progeny in any quantity and at any time of year as long as the licensee complies with the requirements of this part, *except that the licensee may not allow the shooting of game animals or alternative livestock, as defined in 87-2-101 or 87-4-406, or of any exotic big game species for a fee or other remuneration on an alternative livestock facility.*

It also amended Section 87-4-412, MCA, by deleting the existing language regarding transfer and substituting

the following: "An alternative livestock ranch license for a specific facility is not transferable." These changes outlaw fee shooting of game farm animals and preclude the sale of licenses.

Parties

2. The Wallaces were the sole owners of the Big Velvet Ranch, a 1,944-acre game farm in Ravalli County, Montana, under alternative livestock license 211.

3. The Buhmanns are the sole owners of Circle Eagle Game Farm, a 29-acre game farm in Blaine County, Montana, under alternative livestock license 623.

4. The Montana Department of Fish, Wildlife and Parks (FWP) is an agency of the state of Montana and has certain regulatory responsibilities regarding the alternative livestock industry, pursuant to Title 87, chapter 4, part 4, MCA.

5. Defendant Jeff Hagener is the Director of FWP, and Defendant Mike McGrath is the State of Montana Attorney General. Both have been sued in their official capacities.

6. Intervenors are Montana sportsmen's groups that supported the passage of I-143.

The Wallaces

7. The Wallaces purchased several thousand acres of land in Ravalli County in 1991. They did not purchase that land with the specific intent to operate a game farm, but intended to use it lucratively. The next year, they decided to obtain a license to operate a game farm. They began with less than 50 acres under license, but through several expansions approved by the State, their game farm, which they named the Big Velvet Ranch, grew to 1,944 acres. Their licenses have always contained numerous license stipulations further limiting their game farm operations.

8. The Wallaces' business plan involved the creation of a shooting preserve which would offer fee-shooting opportunities to clients. They constructed roads, and bought equipment and inventory. They constructed 25 miles of specialized fencing. They also built a lodge to serve their game farm clients.

9. The Big Velvet Ranch guaranteed that each client could kill an elk of the client's choice. Typically, the client would contact the ranch and specify the kind of animal desired, including the animal's sex and the size of its antlers. The ranch would ensure that the animal the client desired was available on the premises, would guide the client to where the animal was located, and would assist the client in killing it.

10. The Wallaces tested their animals regularly for tuberculosis and brucellosis, receiving disease free certifications for those diseases. They also voluntarily

tested all dead animals for CWD from 1998 until the ranch closed, receiving consistent negative reports. They retained veterinarian services for the elk; each animal was inspected, wormed, blood tested, and assessed annually.

11. They eventually expanded their elk population to approximately 900 animals.

12. In 1993, the State adopted requirements that an environmental review under the Montana Environmental Policy Act be conducted before FWP could issue a game farm license or approve an expansion of an existing game farm. That same year, the Wallaces applied to the State to expand their game farm to 1,944 acres. The State received public comments indicating several concerns, such as disease and parasite transmission between captive and wild animals; erosion from road construction and concentration of game farm elk; soil, vegetation and riparian damage; loss of native wildlife habitat; and genetic pollution of the native wildlife. The Wallaces' application was approved with specific conditions, including the erection of a double 8-foot or a single electric 9-foot fence, department approval prior to constructing exterior gates, and road and fence construction in a manner that would minimize soil disturbance and erosion.

13. In 1997, FWP denied the Wallaces' request for further expansion of their game farm. The proposal would have added approximately 1,000 acres to

their existing 1,944-acre game farm operation and would have increased the size of their elk herd.

14. Shortly after their request for expansion was denied, Wallaces decided to sell their property, because they were concerned that they would not have enough grazing land for their elk. They acquired a game farm in Wisconsin to provide grazing land for their Montana animals, but were unable to ship the animals back and forth across state lines due to restrictions on interstate shipment of elk as a result of outbreaks of CWD on game farms in several states, including Montana. In fact, the CWD outbreak on another elk farm had a negative impact on the Wallaces' business and affected their ability to sell the property. Their Montana property was still on the market when I-143 became effective in November 2000.

15. After I-143 became effective, the Wallaces began selling off their elk and game farm equipment at a substantial loss compared to the pre-I-143 value. Their purchases of elk from 1997 through 1999 totaled $666,166. Len Wallace testified that the value of his elk herd prior to I-143 was approximately $5.5 million; he liquidated the herd for approximately $238,000, and, in some cases, simply donated the elk to various organizations. They sold specialized feeding trucks, which had cost $600,000, for $150,000. They eventually sold their ranch for $4,246,091.

16. Records of the Wallaces' annual purchase and sale of elk and their operating income and expenses for the four-year period prior to passage of

I-143 show total net income of $1,480,452. Their net income in 1997 was $308,091; in 1998, $170,342; in 1999, $362,141; and in 2000, $639,878. After I-143, the business had net income of $54,088 in 2001, and a loss of $158,520 in 2002. Thus, during this six-year period, the Wallaces had net income from the business of $1,376,020.

17. Financial records prepared by Len Wallace for Dr. Nickerson show that the Wallaces spent a total of $1,883,986 on land purchases between 1991 and 1997. They invested $2,505,974 in improvements and capital expenditures, plus an additional $205,163 for the period 1997-2001, for a total basis of $4,595,123. The records show numerous sales of 10 to 40 acre parcels of land between 1994 and 2003 totaling more than $1 million, plus two sales to CB Ranch for more than $5 million.

18. The Wallaces' efforts to market elk outside the state of Montana were impeded by a moratorium on interstate elk shipments from Montana as a result of an outbreak of CWD on a Montana game farm in 1997. Under the moratorium, most states would not allow shipments of elk from Montana unless the game farm tested all dead animals over the age of 16 months for CWD and received negative test results for five years. Interstate sales markets have become more available as Montana game farms are completing the five-year moratorium.

19. The Wallaces suffered a significant, but not complete, loss of value to their elk farm business as a

result of I-143. Evidence indicated that the market for game farm elk in Montana has declined, but game farm elk can still be bred and raised in Montana, and sold to game farms in other states. The animals can also be raised and sold for elk meat and other elk products in Montana.

20. Arguments that current testing regulations and requirements for interstate shipping frustrate shipping of the animals to markets in other states are of little merit. Montana's testing and shipping requirements are as good as, if not better than, those of most other states. Thus, the animals can be sold out of state. Evidence indicated that there has been an increase in out-of-state sales of alternative livestock.

21. Evidence indicates that the Wallaces suffered a 50 percent reduction in value of their business as a result of I-143.

The Buhmanns

22. The Buhmanns acquired the land on which their game farm is operated in the mid-1980's. At the time of the purchase, they had no intention of operating a game farm. They became interested in the game farm business in the early 1990's and then applied for a license.

23. In setting up their game farm, the Buhmanns did not intend to, and never did, operate a fee-shooting business; they planned to raise bull calves

for sale to other game farm operators who would then raise the animals to maturity for fee-shooting purposes.

24. The Buhmanns began the Circle Eagle Game Farm in 1997, after applying for and receiving a $35,000 loan from Bear Paw Development Corporation.

25. Buhmanns received alternative livestock license 623, which allowed them to keep 60 elk. They used the loan proceeds to fence the property and to purchase elk, equipment and inventory. The loan proceeds did not pay for the cost of the property, since it was already paid for.

26. The Buhmanns purchased all of their elk in 1997 for $29,500. Records indicate that they began selling elk in 1999, and their total receipts from elk sales through 2000 were $8,948. They received $11,963 from elk sales in 2001 and 2002. They anticipated eventually selling approximately 10 calves a year for about $30,000.

27. The Buhmanns' primary income was not from the sale of elk, but from the sale of a mineral supplement, Sweet Pro, for captive deer and elk. The Buhmanns were the exclusive dealers for Sweet Pro in Montana. Their gross sales of Sweet Pro totaled $14,901 in 2000; $24,111 in 2001; and $29,332 in 2002.

28. The Buhmanns' business had a net operating loss for the years 1997 through 2000 and a net

profit for 2001 and 2002; overall for the period from 1997 through 2002 the business had a net loss of $41,325.

29. No aspect of the Buhmanns' business was prohibited by I-143. After the effective date of the initiative, the Buhmanns continued to sell their elk and Sweet Pro. The statewide markets for elk and Sweet Pro have declined as a result of I-143; however, the Buhmanns can still sell their products both within and outside the state of Montana.

30. Evidence indicated that the Buhmanns' business suffered a $22,000 loss in value as a result of I-143.

31. For both the Buhmanns and the Wallaces, most of the decrease in value of the businesses as found by Plaintiffs' expert is attributable to the loss of future profits.

32. The Buhmanns and the Wallaces attempted to mitigate their losses by selling their animals and equipment at prices reflecting their reduced values and by giving some of their animals to charity.

33. In 2000, there were 83 alternative livestock facilities with 4,500 animals on 14,500 acres of land. Fewer than 10 facilities engaged in fee shooting; most were in the business of breeding and selling the animals.

34. Currently there are 68 alternative livestock facilities with 3,500 animals on about 12,000 acres of

land. Most of the decrease was from the shutdown of the Wallaces' ranch.

Property Interests at Issue

35. Game farm licenses are renewable annually. Both the Buhmanns' and the Wallaces' licenses contain the following language:

> This license is valid for the specified acreage on the following described lands while owned or leased by him in accordance with the provisions of Title 87, Chapter 4, Parts 4, 9, and 10 Montana Codes Annotated and Title 12, Chapter 6, Subchapter 15, 16, and 17 Administrative Rules of Montana.

36. The Buhmanns' and the Wallaces' licenses also contain the following language: "The following stipulations apply to this license in addition to the general requirements of the game farm statutes and rules for Montana Fish, Wildlife, & Parks and the Montana Department of Livestock. . . ."

37. The legislature has strictly regulated the game farm industry since 1917 in Title 87, chapter 4, part 4, MCA. Additionally, to further implement the statutes, FWP and Department of Livestock promulgated regulations governing nearly every aspect of game farming, such as entry into the market; fencing; disposition of escaped game farm animals and wild animals that invade game farms; extensive record keeping requirements; identification requirements; mandatory disease inspection and genetic and disease

testing; maintenance of quarantine facilities; and a comprehensive testing program for CWD. A.R.M. Title 12, chapter 6, and Title 32, chapter 4.

38. The legislature permitted game farm operations only as long as they were in compliance with the licensing requirements and regulations. Failure to comply would result in license revocation and criminal prosecution. Sections 87-4-423, -427, MCA.

39. I-143 did not ban the entire game farming industry; it only banned fee shooting. Plaintiffs could continue to have game farms, but the initiative significantly reduced the economic feasibility of their businesses.

40. When they began their game farm operations, Plaintiffs were aware of the pervasively regulated industry. They knew that their operations were subject to compliance with all applicable laws and regulations.

41. Plaintiffs also knew from the outset that their game farm operations were a matter of legislative grace, and that the State could, at any time, impose new limits on their operations.

42. Plaintiffs had significant investment-backed expectations. However, their objective expectations must be adjusted downward commensurate with the unguaranteed security of game farm operations in Montana.

The State's Interest in Implementing I-143

43. I-143 was a highly controversial measure among game farmers. It was the subject of testimony during consideration of legislation at the May 2000 special legislative session, which passed legislation enacting a moratorium on new game farm licenses until such time as the Department of Livestock certified the existence of a live test for CWD.

44. Evidence established that I-143 advances various and substantial state interests. The measure furthers the State's interest in protecting wild game populations from the spread of diseases and from genetic pollution of wildlife. It also furthers the State's interest in promoting its hunting heritage. The intended effect of I-143 was to reduce the number of game farms and captive game animals in Montana to further those state interests.

45. Game farms are associated with the spread of disease among captive animals and between captive and wild animals. Game farms have an unnaturally high density of elk and deer in an enclosed environment. The concentrated association of the animals, especially when they are feeding together, fosters the spread of disease among them. Transporting the animals between game farms also enables the transmission of disease. Unnatural stressors that captive animals suffer, such as tagging, transporting and human contact, increase the risk of disease. Any wild animals that wander near the enclosure can be infected with those diseases and pass them on to

other wildlife. Additionally, evidence established that game farms invariably have occasional escapees, which can infect the native population before being caught.

46. Testing protocols are not entirely effective in preventing the spread of disease among game farm animals. Tests do not prevent the spread of disease – they merely monitor it. Even tests for relatively well understood diseases, such as tuberculosis, are not completely effective in preventing transmission of disease among captive animal populations. In the early 1990's, a significant outbreak of tuberculosis in game farm elk in Canada was traced to an animal imported from Montana. The importation of the infected animal was accomplished despite compliance with the testing requirements then in place.

47. Chronic Wasting Disease (CWD) is another transmittable disease of great concern. It is a poorly understood disease in the same family as bovine spongiform encaphalopathy, commonly known as Mad Cow Disease. Presently there is no test for the presence of CWD in live elk and deer. Scientists assume that a five-year testing cycle in which all dead elk over the age of 16 months from a particular game farm are tested for the disease is sufficient to determine whether the herd is infected, but the exact incubation period and means of transmission of the disease are not completely understood.

48. The consequences of a CWD outbreak are catastrophic. When CWD occurred on a Montana

game farm, the entire elk population on the farm was destroyed. In the wild, the only way to deal with a CWD outbreak is to kill off the entire population of wild elk and deer in the infected area. CWD may linger in an infected area for a substantial period of time. The infectious agent migrates to the bones of the dead animal, where it may remain long after the animal decomposes. This is especially dangerous for wild elk because they chew the bones of dead elk.

49. Game farms cause genetic pollution of the native wildlife. Many of the game farm animals are brought to Montana from other states, like the animals that the Wallaces imported from Colorado and Missouri. As previously mentioned, game farm animals occasionally escape to the wild, and some of them are never caught. For example, the Wallaces were unable to account for 11 animals when they depopulated their farm. The escaped animals breed with native wildlife, causing genetic pollution in the native population. The genetic pollution resulting from interbreeding of the captive and native populations cannot always be detected through testing. Red deer gene testing, for example, is only effective for the first generation of offspring.

The breeding of captive elk for extraordinarily large antlers can also be harmful to the wild elk population if interbreeding occurs. The very large antlers look good on a wall but are heavy and cumbersome to the elk, which discourages breeding.

50. Game farms are inconsistent with Montana's hunting heritage. One of the fundamental elements of the State's hunting heritage is the concept of fair chase. The State has incorporated this concept in its laws and regulations governing hunting of wildlife, such as prohibitions against using spot lights, shooting from vehicles and baiting.

51. Fair chase involves the hunter's ability to kill an animal based on the hunter's skill and luck, and the animal's opportunity to run away and hide from the hunter. Fair chase has no guarantee that the hunter will succeed in any given hunt. The hunter may not have undue advantage over the animal by technology or confinement. The principles of fair chase rest on the premise that the animal is free ranging.

52. The Wallaces' game farm did not comply with the elements of fair chase in several aspects: (1) the animals were not free ranging, but were confined within a fenced area; (2) the animals had limited opportunity to elude the hunter; and (3) the hunter was guaranteed a kill of the animal of his/her choice. The hunter would make reservations in advance, requesting a particular kind of animal with respect to size, gender and size of antlers. The hunter was guided to the location of the particular animal and was assisted in shooting it.

53. Evidence indicated that captive game hunting undermines the value of wild game. Game farm clients pay a lot of money to shoot a captive animal

because it looks like the wild animal that traditionally took a lot of effort and challenge to hunt and kill.

54. I-143 furthers the State's interests as described above by reducing the numbers of game farms and of captive animals. Plaintiffs pointed out that the State always had an interest in protecting the environment, its wildlife and its hunting heritage, even when it permitted game farms through the legislature. In other words, if the State specifically legislated game farms into existence when those interests already existed, how can those interests be furthered now by limiting those same game farm operations? Testimony and evidence supports the notion that when game farms were initially permitted, they were a relatively new concept and no one contemplated the risks and dangers that were later determined to exist. Moreover, the tension between game farm operations and the need to maintain the integrity of the wildlife, the environment and the hunting heritage was not apparent until the game farms were in existence. Evidence established that the fewer captive game animals there are, the lower the risk of harm to native wildlife, the environment and the hunting heritage.

CONCLUSIONS OF LAW

1. This action involves a claim for damages under both the United States Constitution and the Montana Constitution for the alleged uncompensated

taking of Plaintiffs' property by the State. This Court has jurisdiction over the subject matter (Section 3-5-302(3), MCA) and the parties (Rule 12(h), M.R.Civ.P.), and venue is proper in this county (Section 25-2-126(1), MCA).

2. Plaintiffs assert that this Court should find a taking of their property by the State on the following grounds:

a) I-143 caused a regulatory taking of Plaintiffs' property interests under the Montana and United States Constitutions under the ***Penn Central***[1] ad hoc balancing test;

b) I-143 caused a regulatory taking of Plaintiffs' property interests under the Montana and United States Constitutions because it fails to substantially advance legitimate State interests;

c) I-143 caused a taking of Plaintiffs' property under Article II, section 29, of the Montana Constitution because it did not use the least restrictive means to accomplish the State's legitimate purposes;

d) I-143 caused a regulatory taking of Plaintiffs' property interests under the Montana and United States Constitutions because it imposed unreasonable price controls on the fees charged by Montana game farms to consumers seeking to shoot

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[1] ***Penn. Central Transp. Co. v. New York City***, 438 U.S. 104, 124 (1978).

alternative livestock on game farms, which precluded the Plaintiffs from realizing a reasonable return on their investment; and

e) While the severity of the impact of I-143 is likely to vary among various operators of alternative livestock, due to the unique circumstances of these Plaintiffs, the impact was severe. Out of fairness and justice the economic impact of I-143 on these Plaintiffs should be borne by the public at large.

3. The Fifth Amendment to the United States Constitution provides in relevant part, "nor shall private property be taken for public use without just compensation." This guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." ***Armstrong v. United States***, 364 U.S. 40, 49 (1960).

4. Article 11, section 29, of the Montana Constitution provides in part: "Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner."

5. This Court has already ruled in this case that the same legal analysis is appropriate for Plaintiffs' claims under both constitutions. (Decision & Order, at 4, (Oct. 22, 2004)).

6. At issue in this case is an asserted "regulatory taking" in which government does not directly occupy property but rather imposes regulations which

affect the use and value of the property. The United States Supreme Court in ***Penn. Coal Co. v. Mahon***, 260 U.S. 393 (1922), recognized that the takings clause applies to regulatory takings as well as direct appropriations of property.

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

Id. at 413. The general rule is that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." ***Id.*** at 416.

7. In some cases a regulation may be so detrimental to an owner's interest as to constitute the equivalent of a physical appropriation. ***Lucas v. S.C. Coastal Council***, 505 U.S. 1003 (1992). Such a "categorical taking" occurs when a regulation deprives an owner of all economically beneficial or productive use of land. This Court has already ruled

that this case is not a categorical taking of land and that the personal property at issue in this case cannot be the basis for a categorical taking claim. (Decision & Order, at 5-6 (Oct. 22, 2004)).

8. The issue of whether a regulation "goes too far" and constitutes a taking requiring compensation is to be analyzed using an ad hoc, factual inquiry. ***Penn. Central Transp. Co. v. New York City***, 438 U.S. 104, 124 (1978). Factors to be considered include the economic impact of the regulation on the claimant, the extent to which the regulation interferes with distinct investment backed expectations, and the character of the government action. ***Id.***

9. The United States Supreme Court has noted that there is no abstract or fixed point at which judicial intervention becomes appropriate. "Resolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic." ***Andrus v. Allard***, 444 U.S. 51, 65 (1979).

10. The burden of proof with respect to a regulatory taking claim rests with Plaintiffs. ***Keystone Bituminous Coal Ass'n v. DeBenedictis***, 480 U.S. 470, 485 (1987).

11. In cases where, as here, there has been no physical appropriation of the property but merely a regulatory restriction on the use of that property, "the Supreme Court has generally held that the restriction is constitutionally permissible in the absence of compensation." ***Yancey v. United States***, 915 F.2d 1534, 1540 (Fed. Cir. 1990). In particular, cases such as the

one before this Court in which plaintiffs seek compensation for loss of value of a business interest or income-producing personal property, have met with little favor in the courts. While each case must be resolved on its own set of circumstances, a review of some of these cases will be helpful in this Court's consideration of the ***Penn. Central*** factors.

12. In ***Andrus v Allard***, the United States Supreme Court held that the prohibition of the sale of lawfully acquired eagle artifacts did not effect a taking in violation of the Fifth Amendment. 444 U.S. at 67-68.

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

Id. at 65-66 (citations omitted).

13. The Court in ***Andrus*** noted that regulations barring trade in certain goods have been upheld against claims of unconstitutional taking and cited

several cases in which the Court sustained regulations which prohibited sale of alcoholic beverages even though individuals were left with previously acquired stock. The Court cited ***Everard's Breweries v. Day***, 265 U.S. 545 (1924), which involved a federal statute forbidding the sale of liquors manufactured before passage of the statute, in which the claim of a taking in violation of the Fifth Amendment was "tersely rejected." ***Andrus***, 444 U.S. at 67. Similarly, in ***Jacob Ruppert, Inc. v. Caffey***, 251 U.S. 264 (1920), which involved a ban on sales of certain beverages on hand at the time of the passage of the act, the Court dismissed the takings challenge, stating that "there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use." ***Andrus***, 444 U.S. at 67.

14. The ***Andrus*** decision also cited ***Mugler v. Kansas***, 123 U.S. 623 (1887), in which a Kansas distiller who had built a brewery while it was legal to do so challenged a Kansas constitutional amendment prohibiting the manufacture and sale of intoxicating liquors. The ***Mugler*** Court recognized that the "buildings and machinery constituting these breweries are of little value" because of the amendment. ***Id.*** at 657. However, the Court held:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or

> an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not – and, consistently with the existence and safety of organized society, cannot be – burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Id. at 668-69. The principles in ***Mugler*** continue to be good law. *See, e.g.,* ***Goldblatt v. Hempstead***, 369 U.S. 590, 593 (1962); ***Keystone Bituminous Coal***, 480 U.S. at 489.

15. The police power has been found to protect the government from having to pay compensation when liquor, legally manufactured and possessed prior to prohibition, was declared contraband and seized. In ***Samuels v. McCurdy***, 267 U.S. 188 (1925), the United States Supreme Court held that no compensation was due under the Fifth Amendment for the seizure of stocks of liquor that were acquired before prohibition but became contraband after adoption

of the prohibitory statute. "The legislature has this power [to ban the manufacture, sale and possession of alcohol] whether it affects liquor lawfully acquired before the prohibition or not. Without compensation it may thus seek to reduce the drinking of liquor." ***Id.*** at 198.

16. Lower federal courts have applied this analysis in rejecting taking claims arising from regulations that impair the profitability of already highly regulated businesses. In ***Mitchell Arms, Inc. v. United States***, 7 F.3d 212 (Fed. Cir. 1993), the court considered the claim of an arms dealer who contracted to purchase assault rifles for delivery into the United States, which had been permissible under the regulations in effect when the contract was entered and performed. After Mitchell received permits from the Bureau of Alcohol, Tobacco and Firearms (ATF) for the importation of the assault weapons, however, the ATF suspended all importation of assault rifles into the United States. Mitchell sued, claiming that the contract for the purchase of the weapons was property that had been categorically taken by the ATF's suspension of imports. The Federal Circuit affirmed the Claims Court's holding that no taking occurred. It reasoned that one who enters into a heavily regulated commercial environment accepts the risk that changes in government regulation may limit, or even eliminate, their opportunity to make a profit from their business. In such cases, the opportunity to operate a profitable business is not

"property" for which a successful taking claim may be brought. The court explained:

> Mitchell's expectation of selling the assault rifles in domestic commerce – the interest affected in this case – was not inherent in its ownership of the rifles. Rather, it was totally dependent upon the import permits issued by ATF. In short, Mitchell's ability to import rifles and sell them in the United States was at all times entirely subject to the exercise of ATF's regulatory power. Consequently, any expectation which arose on Mitchell's part as a result of the import permits did not constitute a property right protected by the Fifth Amendment.

Id. at 17. *See also* ***Allied-Gen. Nuclear Servs. v. United States***, 839 F.2d 1572, 1577 (Fed. Cir. 1988) (The court rejected a taking claim arising from termination of a nuclear power plant project in which the builders had invested $200 million because the government decided that threats of terrorist activity had created a risk to national security that required termination of the program.); ***Conti v. United States***, 291 F.3d 1334 (Fed. Cir. 2002) (The government changed the regulations on apportionment of fishing grounds in a way that prohibited a fisherman from continuing to make a living in the manner to which he had become accustomed.).

17. In some cases, however, federal courts have found that a regulation affecting the profitability of

a business effected a taking which must be compensated. In ***Yancey***, a federally-imposed quarantine prevented the Yanceys from shipping their turkeys interstate even though their birds were not diseased. They were forced to sell the flock for slaughter at a substantial loss due to the economic infeasibility of continuing to feed birds that they could not sell. The Federal Circuit Court held that the Yanceys were entitled to compensation:

> When adverse economic impact and unanticipated deprivation of an investment backed interest are suffered, . . . compensation under the Fifth Amendment is appropriate. . . . Why should the Yanceys be forced to bear their own losses when their turkeys were not diseased? The Yanceys' losses came about because of the Government's action. If the intent of the poultry quarantine was to benefit the public, the public should be responsible for the Yanceys' losses.

Yancey, 915 F.2d at 1542. *See also* ***Rose Acre Farms v. United States***, 373 F.3d 1177, 1196-97 (Fed. Cir. 2004).

18. These cases establish some of the principles this Court will consider in its analysis of the ***Penn Central*** factors. Other cases will be discussed where relevant.

Penn Central Analysis

Economic Impact

19. The Court received limited information about Plaintiffs' investments, presumably because this portion of the case dealt with the question of whether a taking occurred, rather than the amount of damages. However, the evidence was sufficient to make relevant findings as to the general extent of Plaintiffs' losses after I-143.

20. Passage of I-143 had a significant economic impact on Plaintiffs, but the nature of that impact differed somewhat between the two businesses.

a) The measure prohibited the Wallaces' fee-shooting business entirely. For the Buhmanns, however, the effect of I-143 was to effectively eliminate the in-state market for both their elk and their feed supplement; they were still free to conduct sales of either product to out-of-state buyers.

b) Neither lost any significant value in their land and improvements.

c) Both lost substantial market value in their elk herds.

d) Both lost the future profits they expected to earn. However, the Wallaces had already earned a substantial profit on their investment in the business, whereas the Buhmanns had not yet recouped their investment.

21. The value of both businesses had already been negatively affected by factors other than I-143, particularly the growing concern about chronic wasting disease (CWD). CWD was also one of the reasons Plaintiffs could not profitably dispose of their elk to out-of-state buyers. Thus, not all of their financial losses are attributable to I-143.

22. The Wallaces had already made the decision to get out of the game farming business in Montana and had placed their property for sale.

23. This ***Penn Central*** factor favors Plaintiffs.

Investment-Backed Expectations

24. At the time of I-143's passage in November 2000, the Wallaces had a profitable business and the Buhmanns were just beginning to show a profit from their business. Both had a business plan in place projecting the growth of their businesses, and both had investment-backed expectations of continuing to earn profits.

25. Plaintiffs relied on the regulatory scheme in place at the time they made their investments, which set conditions for the operation of game farms. However, they were engaged in a highly controversial and highly regulated business.

26. Plaintiffs insist that, although they knew that the game farming venture was both controversial and entirely government regulated, they had no expectations that the State would ever regulate them

out of business. It is certainly hard to imagine investing significant capital into a venture that has an anticipated precarious future.

27. However, the capital-backed expectation in the ***Penn Central*** balancing test is an objective rather than subjective factor and has been interpreted to mean a reasonable expectation. *See* ***Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City***, 473 U.S. 172, 191 (1985). Moreover, the federal courts tend to hold such an expectation to a very high standard, and have held that when someone voluntarily enters into a highly regulated enterprise, such as firearms importation (***Mitchell Arms***) or plutonium recycling (***Allied-Gen. Nuclear Servs.***) that person cannot be said to have a reasonable expectation that his business will be permitted to continue indefinitely, and the government can effectively regulate such enterprises out of existence.

28. The Court is aware of other cases that have treated plaintiffs more kindly with respect to application of the expectation factor of the ***Penn Central*** test, for example ***Yancey***. The reasoning and outcome of those cases are in the minority of cases addressing capital-based expectations. This Court declines to adopt the minority approach.

29. The Court is therefore led to conclude that Plaintiffs lacked a reasonable capital-based expectation under the ***Penn Central*** test.

30. This factor favors the State.

Nature of the Government Regulation

31. The cases previously cited and discussed, along with the evidence presented, lead the Court to conclude that I-143 was a valid exercise of the State's police power to protect health and welfare, and that I-143 affected an industry that was already subject to significant government regulation.

32. The previously discussed prohibition cases in particular demonstrate the authority of the State to exercise its police power over commercial enterprises without incurring liability for resulting business losses.

33. This factor is also determined to be in the State's favor.

Balancing of Factors

34. In balancing the ***Penn Central*** factors, the Court must remain mindful that they should not be weighed in a vacuum, but rather in the light of the particular circumstance and economic history of each plaintiff. The Court also looks to precedential authority in assessing each plaintiff's economic situation and finds the following principals to be applicable.

35. The fact that a regulation reduces the value of property and prevents the most profitable use of that property is not dispositive of whether a taking has occurred. ***Andrus***, 444 U.S. at 66.

36. Lost profits, absent any physical property restriction, "provides a slender reed upon which to rest a takings claim . . . the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." ***Id.***

37. There is no set formula to determine where regulation ends and taking begins. A comparison of values before and after is relevant but not conclusive. ***Goldblatt***, 369 U.S. at 594, *citing* ***Hadacheck v. Sebastian***, 239 U.S. 394 (1915) (upholding a diminution in value from $800,000 to $60,000).

38. "[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless. . . ." ***Lucas***, 505 U.S. at 1027-28.

39. "[G]overment regulation – by definition – involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase." ***Andrus***, 444 U.S. at 65.

40. The nature of the economic impact mitigates in favor of Plaintiffs. However, because they knowingly entered into a highly regulated industry, this impact must be offset by the fact that they should have anticipated the possibility that future

regulations could impede their anticipated business profits.

41. Furthermore, as discussed previously, Plaintiffs' property interests, i.e., business-related personal property and anticipated profits, are accorded little protection in takings jurisprudence.

42. The factor weighing most heavily in this balancing is the government's police power which permits the State to control and regulate the elk farm industry for the benefit of the health and welfare of its citizens, even to the point of eliminating the industry, as demonstrated in the prohibition cases.

43. Having weighed all of these factors, the Court concludes that the balance weighs in favor of the State. Therefore, no taking has occurred.

Other Arguments

Yancey

44. Plaintiffs, citing ***Yancey***, argue that their elk were not diseased and therefore they should not bear the cost for the State's avowed purpose of preventing the spread of disease to wild elk.

45. This Court finds ***Yancey*** distinguishable for several reasons. First, the quarantine affecting the Yancey's turkeys was imposed shortly after Yancey's acquisition of the flock, and there was no evidence that Yanceys had already earned any return on their investment. Second, the quarantine was imposed on

an emergency basis with only one day's notice. In the case before this Court, the question of game farms had been controversial for years before the passage of I-143. Third, the ***Yancey*** court considered only the value of the birds themselves and appeased to use a categorical taking approach to the question of compensation for personal property, finding that the Yanceys were entitled to compensation because they were left with no economically viable use of their property. This Court finds it more appropriate to consider the value of the elk within the context of Plaintiffs' overall business enterprises and has already determined that interests in property other than land cannot be the basis for a categorical taking. Last, the decision in ***Yancey*** is simply inconsistent with the weight of other cases. As the court in ***Yancey*** acknowledged, the United States Supreme Court has generally held that regulatory restrictions on the use of property, absent a physical taking, are constitutionally permissible without compensation.

Substantially Advances Test

46. Plaintiffs assert that I-143 caused a taking of Plaintiffs' property because it fails to substantially advance the interests which the State has identified as the reasons for I-143, namely interests in preventing or controlling the spread of disease or genetic pollution, interests in hunting ethics or fair chase, interests in promoting its hunting heritage, and interests in preserving habitat for wild animals on private property.

47. The "substantially advances" test has been used by the Ninth Circuit in the context of whether rent control regulations effect a taking. *See e.g.* ***Chevron USA, Inc. v. Cayetano***, 224 F.3d 1030 (9th Cir. 2000), *cert. granted sub nom* ***Lingle v. Chevron USA***, 125 S.Ct. 314, 160 L.Ed. 2d 1065 (2004); *see also* ***Esposito v. S.C. Coastal Council***, 939 F.2d 165 (4th Cir. 1991) (discussing whether restrictions on beachfront property bore a substantial relation to the goal of protecting South Carolina's beach system). The use of this standard arises out of language in ***Keystone Bituminous Coal*** that a land use regulation may constitute a taking if it "does not substantially advance legitimate state interests, . . . or denies to an owner economically viable use of his land." 480 U.S. at 485, *quoting* ***Agins v. Tiburon***, 447 U.S. 255, 260 (1980).

48. The State questions whether this standard is applicable here. The Court finds it unnecessary to resolve that question because I-143 meets the substantially advances test.

49. A regulatory action substantially advances a legitimate public interest if it bears a reasonable relationship to that interest. ***Chevron***, 224 F.3d at 1041. The intended effect of I-143 was to reduce the number of game farms and captive game animals in Montana, thereby reducing potential contact between captive game animals and wild game. This clearly bears a reasonable relationship to the State's interest in protecting wild game populations from the spread

of diseases and from genetic pollution by game farm animals.

50. Plaintiffs raised the notion that simply outlawing all captive game farms would more effectively further the State's alleged interests described above than the implementation of I-143. However, the validity of I-143 may not be challenged on the ground that it is a less than an ideal solution to further the State's interest. Where the record indicates that the essential nexus between the State's interest and its chosen means is present, courts should not second-guess the State's choice. ***Esposito***, 939 F.2d at 169.

Least Restrictive Means

51. Plaintiffs next assert that even if the State's goals for enacting I-143 were valid, the State was required to use the least restrictive means to achieve those goals. This argument was rejected in ***Andrus***, where the United States Supreme Court stated that even if there were alternative ways to meet the stated goals, "Congress was free to choose the method it found most efficacious and convenient" and "'is itself the judge of the necessity or expediency of the means adopted.'" 444 U.S. at 58-59, *quoting* ***New York ex rel. Silz v. Hesterberg***, 211 U.S. 31, 40 (1908).

Fundamental Right

52. Plaintiffs also argue that because the just compensation clause is within Montana's declaration

of rights, the State must show a compelling state interest for I-143 because it invades a fundamental right, and must furthermore demonstrate that I-143 was the least restrictive means to achieve its objective. This argument mis-characterizes the nature of the fundamental right found in Article II, section 29, of the Montana Constitution – it is not the right to use property in a particular way, but rather the right to receive just compensation if a taking has occurred. Plaintiffs' fundamental rights are not implicated unless, under the standards articulated in ***Penn Central*** and similar Montana takings cases, this Court were to determine that a taking had occurred – neither the compelling state interest test nor the least restrictive means test is applicable to that analysis.

Price Control

53. Plaintiffs next argue that I-143 imposed an unreasonable price control on the fees charged for shooting animals on game farms which precluded Plaintiffs from realizing a reasonable return on their investment. This argument fails for several reasons, not least of which is that I-143 did not impose a price control on fee-shooting – it banned it altogether. In addition, the cases cited by Plaintiffs in support of this argument are utility and railroad regulation cases, not taking claims, and thus are inapplicable. Furthermore, this argument would apply only to the Wallaces, since the Buhmanns were not engaged in fee-shooting, and evidence established that the

Wallaces earned a significant profit on their operation.

Justice and Fairness

54. Lastly, Plaintiffs assert that the financial burden of I-143 fell particularly heavily on them and, out of justice and fairness, this burden should be borne by the public at large. These questions of fairness and the nature of the financial burden imposed by I-143, however, are already encompassed within the ***Penn Central*** analysis. Although Plaintiffs will have to bear the financial burden of I-143, "within limits, that is a burden borne to secure 'the advantage of living and doing business in a civilized community.'" ***Andrus***, 444 U.S. at 67, *quoting* ***Penn. Coal Co.***, 260 U.S. at 422 (Brandeis, J., dissenting).

State's Arguments

55. The State raised several arguments regarding the nature of Plaintiffs' property interests, asserting that such interests are not recognized as compensable under takings jurisprudence. In particular, the State argues fervently that under the analysis in ***Am. Pelagic Fishing Co. v. United States***, 379 F.3d 1363 (Fed. Cir. 2004), Plaintiffs' asserted property right is not one that is protected under the takings clause and thus this Court's consideration of their claims need go no further.

56. ***American Pelagic*** does appear to support the State's position. However, this Court took into account the nature of Plaintiffs' property interests when considering the ***Penn Central*** factors. Having determined that under the ***Penn Central*** analysis, no compensable taking occurred, this Court need not rule on this argument.

ORDER

The passage and implementation of I-143 did not result in an uncompensated taking of Plaintiffs' property under the United States and Montana Constitutions. Judgment is therefore GRANTED to Defendants on the issue of liability.

Let judgment be entered accordingly.

DATED this 2 day of May, 2005.

/s/ Dorothy McCarter
DOROTHY McCARTER
District Court Judge

pcs: Arthur V. Wittich
Jack T. Tuholske
Mike McGrath/Chris D. Tweeten
Robert N. Lane

Hon. David G. Rice
District Judge
Hill County Courthouse
315 4th Street
Havre, MT 59501
406-265-5481 (231)

MONTANA TWELFTH JUDICIAL
DISTRICT COURT, HILL COUNTY

KIM J. KAFKA and CINDY R. KAFKA, individually and as husband and wife; and as members of DIAMOND K RANCH ENTERPRISES LLC, a Montana Limited Liability Company, Plaintiffs, and JACK BRIDGEWATER and MYRA BRIDGEWATER, individually and as members of PHANTOM BULL ELK RANCH, LLC, and JIM BOUMA and BAPBARA BOUMA, Plaintiffs-Intervenors, v.	Cause No. DV-02-059 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE REGARDING TAKING LIABILITY** (Filed Feb. 8, 2005)

THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS, and THE STATE OF MONTANA,

Defendants,

and

SPORTSMEN FOR I-143, MONTANA WILDLIFE FEDERATION,

Defendants-Intervenors.

This case came before the Court for bench trial on May 19- 20, 2004, with respect to the question of whether the Defendants are liable under the Fifth Amendment and Montana Constitution article II, section 29, for an uncompensated taking of property of the Plaintiffs and Plaintiff-Intervenors resulting from the enactment and enforcement of Initiative Measure 143 ("I-143"). The Plaintiffs, Kim J. Kafka and Cindy R. Kafka, individually and as members of Diamond K Ranch Enterprises, LLC, were represented by their counsel, John E. Bloomquist. Hereafter, unless the context requires otherwise, the Kafkas and Diamond K Ranch Enterprises, LLC, will collectively be referred to as "Kafkas." The Plaintiff-Intervenors, Jack Bridgewater and Myra Bridgewater, individually and as members of Phantom Bull Elk Ranch, LLC, and Jim and Barbara Bouma, were represented by their counsel, Ward Taleff. Hereafter, unless the context requires otherwise, the Bridgewaters

and Phantom Bull Elk Ranch, LLC, will collectively be referred to as "Bridgewaters," and Jim and Barbara Bouma will collectively be referred to as "Boumas." Hereafter, the term "Plaintiffs" will be used collectively to refer to all of the Plaintiffs and Plaintiff-Intervenors. The Defendants, Montana Department of Fish, Wildlife and Parks and the State of Montana were represented by Chris D. Tweeten, Chief Civil Counsel, Office of the Attorney General. The Defendant-Intervenors Sportsmen for I-143 and Montana Wildlife Federation were represented by their counsel, Sarah McMillan.

The Court allowed counsel until June 18, 2004, to file final proposed findings of fact and conclusions of law.

From the evidence presented at the hearing, the Court makes the following.

FINDINGS OF FACT

Parties

1. The Kafkas operate an alternative livestock ranch on two parcels of property located in Hill County, Montana. They hold Montana alternative livestock License 622, and are members of Diamond K Ranch Enterprises, LLC, a Montana limited liability company holding Montana alternative livestock License 626. (Kim Kafka testimony; Defs,' Ex. 25.)

2. The Bridgewaters are the sole owners of Phantom Bull Elk Ranch, LLC, a Montana limited liability company that holds Montana alternative livestock License 802. The Bridgewaters operate their alternative livestock ranch on a 620-acre tract in Broadwater County, Montana. (Jack Bridgewater testimony; Defs.' Ex. 26.)

3. The Boumas operate an alternative livestock ranch on 152 acres of land in Teton County, Montana. They jointly own Montana alternative livestock License 414. (Jim Bouma testimony; Defs.' Ex. 27.)

4. Defendant State of Montana is a sovereign state of the United States of America. Defendant Montana Department of Fish, Wildlife, and Parks ("DFWP") is an agency of the State of Montana. Mont. Code Ann. § 2-15-3401. By statute, DFWP has certain regulatory responsibilities regarding the alternative livestock industry in Montana. Mont. Code Ann. tit. 87, ch. 4, pt. 4.

5. Defendant-Intervenors Sportsmen for I-143 and Montana Wildlife Federation are Montana sportsmen's groups that supported the passage of I-143. *Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court,* 2002 MT 18, ¶ 12; 308 Mont. 189, 194, 40 P.3d 400, 403 ("The Sportsmen's Groups were the authors, sponsors, active supporters and defenders of I-143.")

Kafka Alternative
Livestock Ranch Operations

6. Kim Kafka's family has been involved in agricultural pursuits on the land operated under License 622 and other lands in the area since 1911. In the 1990s the Kafka family operated a diversified farm and ranch operation involving production of hogs, cattle, and small grains on roughly 5000 acres. (Kim Kano testimony; Charles Celania testimony (Defs.' Ex. 17).)

7. In the mid-1990s, the Kafkas began to investigate ways in which to modify their operation to replace raising of hogs. Kim Kafka investigated the alternative livestock business at some length. (Kim Kafka testimony.) In March 1996, after reviewing DFWP rules, the Kafkas applied for a game farm license for the purpose of instituting a breeder operation for game farm animals, principally elk, on a 39-acre parcel near the Kafka family home place. (Defs.' Ex. 28; Pls.' Ex. A-l; Kim Kafka testimony.) At roughly the same time, Kim and Cindy Kafka entered into a lease with Kim Kafka's mother for a tract of land that included the 39-acre parcel. (Pls.' Ex. H.) In March 1997, following an environmental assessment, DFWP granted the application and issued License 622. (Pls.' Ex. 1; Defs.' Ex. 28; Kim Kafka testimony.) The entire process took two years and seven months to complete. (Kim Kafka testimony)

The environmental assessment document prepared in conjunction with the issuance of License 622

included comments from the public regarding the controversial nature of game farming. Foreshadowing the contentious debate over I-143, the document identified "significant" potential that the issuance of the license would "generate substantial debate and controversy" about game fanning impacts, and DFWP responded:

> The issue of game farming is likely to continue to be a contentious one. There are many people who would like to see game farming prohibited in Montana. Some of these people belong to organizations that will probably continue their efforts to have legislation passed to eliminate game farming. Compliance with game farming regulations will help to minimize problems and controversy surrounding game farms.

(Defs.' Ex. 28 at 19.) Kim Kafka testified on direct that prior to the campaign over I-143 he was unaware of anything that might suggest that fee-shooting might be banned. Given his business acumen, it is more probable than not that Kim Kafka would have read this document when it was issued awarding him his license in 1996. In any event, the document shows that the controversy about game farms was common knowledge, and it is not probable that someone in Kim Kafka's position in the game farm industry would have been unaware of it.

9. The Kafkas' business plan involved development of a fee-shooting operation as the primary revenue source for their game farm. (Kim Kafka

testimony; Charles Celania testimony (Des.' Ex. 17).) In January 1998, the Kafkas and other partners submitted an application for a second game farm license. They amended their application in July 1998. DFWP prepared a 35-page environmental assessment for the proposal. (Pls.' Ex. A-6.) On October 16, 1998, DFWP issued its Decision Document (Pls.' Ex. A-7) granting the license application and issuing License 626.

10. The Decision Document imposed eleven separate stipulations that were required as conditions of the license to mitigate what DFWP perceived as significant environmental impacts and recommended fifteen additional mitigation measures that were not formal requirements. *Id.*

11. According to the Final Environmental Assessment, numerous comments were presented to DFWP during the public hearing on the proposal regarding concerns that fee-shooting on game farms could eventually undermine the sport of hunting in Montana. The first such comment, Public Meeting Comment 9, and DFWP's response are as follows:

> **Public Meeting Comment 9 by Rich Herminghaus:** Eastern Montana representative for the Montana Wildlife Federation. The game farm could disrupt the relationship between sportsmen and the majority of nonhunting people who acknowledge fair chase hunting as an acceptable part of Montana's culture.

> **Response PM-9:** Comment noted. It is beyond the scope of this EA to evaluate potential changes in relationships that may exist or occur between hunters and non-hunters with respect to game farms. The Montana legislature has approved game farms as a regulated activity. The issue of fair chase for hunting wildlife is important to many people in Montana; however, game farms are regulated by FWP separate from hunting activities. The owners of Diamond K Ranch game farm acknowledge that this is not a hunting activity, but is a shooting operation for domestic animals. It is possible that a negative image has or will develop with some of the nonhunting community with respect to game farms; however, FWP has no authority to regulate game farms based solely on public sentiment.

(Pls.' Ex. A-6 at 16.) The EA notes other comments regarding the effect of the game farm on Montana's hunting heritage, and responded to these by reference to the above quoted response. Letter Comment 5 (*id.* at 24); Letter Comment 13 (*id.* at 26); Letter Comment 16 (*id.* at 27); Letter Comment 17 (*id.* at 28); Letter Comment 22 (*id.* at 29); Letter Comment 23 (*id.*); Letter Comment 24 (*id.*); Letter Comment 25 (*id.*); Letter Comment 37 (*id.* at 33); Letter Comment 38 (*id.*); Letter Comment 43 (*id.* at 34); Letter Comment 44 (*id.*).

12. Plaintiffs offered in evidence an excerpt from the 2001 environmental assessment on the

expansion of the Goffena Bull Mountain Elk Ranch, a game farm not involved in this case, to suggest that DFWP had acknowledged that "[t]here is no substantive evidence to suggest that the future of hunting, the tradition of public wildlife ownership, or the future of wildlife is in jeopardy due to the alternative livestock industry." (Pls.' Ex. A-8 at 6.) This evidence is entitled to little weight. It is inconsistent with the agency's response, recounted in Finding of Fact 11, to similar concerns with regard to the very game farm license at issue in this case. The record here contains no information about the Bull Mountain game farm or the state of the record that gave rise to the comments in the Bull Mountain EA. The response recounted in Finding of Fact 11 is more accurate in that it acknowledges that the effect of game farms on sport hunting is properly a matter for consideration by the legislative branch, not by DFWP in an environmental assessment. The statement from the Bull Mountain EA quoted above, taken out of context, is not persuasive as to this issue.

13. License 626 provided for a fee-shooting operation on an 1100-acre tract of land some twenty miles from the License 622 property. The Kafkas constructed the requisite fence and complied with the other stipulations, statutes, and regulations, and commenced their fee-shooting operation in the fall of 1999. (Kim Kafka testimony.)

14. Game farm licenses are renewable annually. As originally issued, and in all subsequent renewals,

both Licenses 622 and 626 contain the following language:

> This license is valid for the specified acreage on the following described lands while owned or leased by him in accordance with the provisions of Title 87, Chapter 4, Parts 4, 9, and 10 Montana Codes Annotated and Title 12, Chapter 6, Subchapter 15, 16, and 17 Administrative Rules of Montana.

The following language also appears on the licenses: "The following stipulations apply to this license in addition to the general requirements of the game farm statutes and rules for Montana Fish, Wildlife, & Parks and the Montana Department of Livestock. . . ." (Pls.' Ex. A-4.) Kim Kafka was aware that his operation was subject to compliance with all applicable laws. (Kim Kafka testimony.)

15. The decision document on License 626 likewise reminded the Kafkas that they were obligated to operate their game farm in compliance with the statutes and regulations, and that they needed to pay attention because the regulatory requirements could change. The document states:

> Licensee must be in compliance with all game farm statutes, rules, and regulations of Montana Fish, Wildlife and Parts [sic] and Department of Livestock. Current regulations are attached for the applicant's information, but it is licensee's responsibility to

> keep up with any changes in the laws and regulations.

(Pls.' Ex. A-7 at 1-2.)

16. License 626 was originally issued to an entity called "Diamond K Partnership." On November 6, 2000, the Department issued a new license transferring ownership to the newly formed Diamond K Ranch Enterprises, LLC. (Pls.' Ex. A-4.)

17. In 1999, the Kafkas reported roughly $11,000 in income for federal tax purposes from their game farm operation. In 2000, they reported roughly $130,000, divided between their own personal income tax return and the partnership return for Diamond K Ranch Enterprises, LLC. In neither tax year did the Kafkas report a taxable profit for federal tax purposes. (State's Ex. 21.)

18. The Kafkas invested several hundred thousand dollars in start-up costs for their game farm operation, including licensing costs, fencing, and acquisition of stock. These investments continued through at least August of 2000, when the Kafkas completed "Phase 2" of the operation under License 626. (Kim Kafka testimony.)

19. On direct examination, Kim Kafka stated that these costs totaled over $1 million. On cross, he conceded that the itemized figure provided in discovery for start-up costs for License 626 was $463,000, and that this figure actually included the value of some

in-kind labor he provided for construction of his fences. (Kim Kafka testimony.)

20. The Kafkas initially provided their own financing for their game farm operation by liquidating other assets to generate cash to fund the business. Their banker, Charles Celania, declined to finance the operation until the Kafkas could demonstrate adequate cash flow to service their debt. The Kafkas generated sufficient cash flow through fee-shooting in the 1999 fall season to convince Mr. Celania to bank the operation. In the year 2000, the bank restructured the Kafkas' short-term farm credit to incorporate their fee-shooting operation. (Charles Celania testimony (Defs.' Ex. 17).)

21. At the time the refinancing was in progress in 2000, Mr. Celania was aware that I-143 was on the ballot. He was not aware, however, that its provisions would ban fee-shooting on the Kafkas' game farm. (Charles Celania testimony (Defs.' Ex. 17).)

22. I-143 was circulated for signatures in the Spring of 2000, and qualified for the ballot in early summer. The evidence preponderates in favor of the view that Kim Kafka was aware of the initiative while he was investing in his operation and contracting with his bank to restructure his debt during the year 2000 and understood when it was initially proposed that if it passed, his fee-shooting operation would be banned.

23. Kim Kafka testified at trial that he believed existing game farms would be grandfathered if the

initiative passed. His belief is not supported by the evidence. First, no language in the initiative could reasonably be interpreted to imply such treatment for existing game farms. Second, Kim Kafka was a leader in the game farm industry. He was a member of the negotiated rulemaking committee that drafted new rules for the industry and was active in the industry association. (Kim Kafka testimony.) He was selected as one of three game farmers to write the ballot arguments against I-143 for the voter information pamphlet. (Defs.' Ex. 29.)

24. I-143 was highly controversial among game farmers. The initiative was the subject of testimony during consideration of legislation at the May 2000 special legislative session, which passed legislation enacting a moratorium on new game farm licenses until such time as the Department of Livestock certified the existence of a live test for chronic wasting disease ("CWD"). 2000 Mont. Spec. Laws, ch. 1, § 1; *see, e.g.*, Minutes of hearing on SB 7 and attached written testimony, House Agriculture Committee (May 10, 2000). It is not credible for an able businessman and industry leader such as Kim Kafka to testify that he was unaware of the effect passage of the initiative would have on his own business.

25. As noted above, Kim Kafka was a member of the three-person committee that drafted the arguments against I-143 found in the voter information pamphlet. Those arguments expressly urged voters to oppose I-143 because it would put existing game farmers out of business. (Defs.' Ex. 29, VIP at 27

("I-143 seeks to prohibit the harvesting of private animals on private property. . . .").) Kim Kafka testified at trial that he attended only one meeting of the committee and was not aware word-for-word of what the arguments said, but he also admitted that he received the pamphlet like every other Montana voter and certainly had access to its contents. For the reasons stated, the Court finds as fact that Kim Kafka was aware during the campaign on I-143, and specifically during the time when he completed the refinancing of his farm debt and the construction of "phase 2" of the License 626 operation that it would, if enacted, ban fee-shooting on his game farm.

26. Kim Kafka adopted a very aggressive business plan designed to make his alternative livestock operation debt-free within a matter of a few years after he began in the business. He eliminated his hog operation, expanded his cattle operation, and put some land in the Conservation Reserve Program. (Kim Kafka testimony.) He chose to put his entire agricultural operation at risk to pursue his game farm project. (Charles Celania testimony (Defs.' Ex. 17 at 16).) For the reasons stated, the preponderance of evidence supports the view, and the Court finds as fact, that as he restructured his debt through Mr. Celania's bank in the spring of 2000, Kim Kafka was aware of the possibility, and took the risk, that I-143 might pass and make it impossible for him to engage in the fee-shooting operation that was to cash-flow his operation.

27. Initiative 143 ended the Kafkas' fee-shooting operation by making it illegal for him to permit clients to shoot game farm animals for a fee or other remuneration on his game farm. It also eliminated what previously had been the major market for animals raised in the breeder operation under License 622. (Kafka testimony; Gilbert testimony; Pls.-Intervenors' Ex. 1.)

28. I-143 did not eliminate markets for the Kafkas' game farm elk in other states. Other states allow importation of game farm elk from herds that have been certified as CWD-free for a period of years that varies from state to state. In the late 1990s, Montana adopted a monitoring program for CWD on Montana game farms, Mont. Admin. R. § 32.4.1301 *et seq.*, that satisfies these out-of-state requirements for herds, like the Kafkas', that have not had an incidence of CWD during the monitoring period. (Tim Feldner testimony.) Kim Kafka testified that his bull elk would bring $1700 to $1800 in these out-of-state markets under current market conditions. (Kim Kafka testimony.) The average price for bull elk for fee-shooting in Montana prior to I-143 would have been $5,000-$6,000. (Ronald Johnson testimony.)

29. After I-143 went into effect, Kim Kafka did not aggressively explore other alternatives for his game farm operation. He engaged in discussions with the Chippewa-Cree Tribes of the Rocky Boys' Reservation regarding a possible joint venture in which he would manage a game farm on tribal property that would be beyond the regulatory reach of I-143. He

provided information to the Tribes regarding the percentage breakdown for sharing of revenue in such an operation. He did not actively pursue this opportunity because his business plan involved a fee-shooting operation on the License 626 property, and he was not interested in conducting a fee-shooting business on tribal property or conveying the License 626 property to the Tribes. (Kim Kafka testimony.)

30. The land on which the Kafkas operate License 622 is leased from Kim Kafka's mother. (Kim Kafka testimony; Pls.' Ex. H.) Kim Kafka's mother is not a party to this action. The land has substantial economic value even if it cannot be used for game farm purposes. The License 622 land is part of a larger tract of 307 acres leased to Kim Kafka by his mother "for the grazing and pasturing of cattle and other types of livestock, including alternative or non-traditional livestock." (Pls.' Ex. H.)

31. The testimony of Defendants' expert, Ed Jackson, is the only evidence in the record regarding the value of the License 622 land. The land's highest and best use is as "a small tract of range land, with a possible conversion to a rural home site with adjoining pasture," and the value of the land and fixtures, as of November 7, 2000, is $34,720. (Ed Jackson testimony; Defs.' Ex. 5 at 37.) The Court notes that Jackson's opinion as to the highest and best use of the land is consistent with the purpose for which Kim Kafka leased the 307-acre tract from his mother, as reflected in the lease (Pls.' Ex. H).

32. Plaintiffs attempted to impeach Jackson's opinion by reference to the fact that the property is under a 10-year renewable lease between Kim Kafka and his mother. (Pls.' Ex. H.) The Court finds that the lease provides no basis to challenge Jackson's opinions. The lease is simply a personal contract between Kim Kafka and his mother. It is not an encumbrance on the title of the land, and does not appear as such in the title report found in Jackson's report. (Defs.' Ex. 5). It does not negatively affect the marketability of the property. (Ed Jackson testimony.)

33. Plaintiffs called their own certified appraiser, Ronald Johnson, as a witness, but he offered no testimony to suggest that such a lease affects the marketability of the property. Because he did not appraise the property himself, he could offer no competing opinion as to whether it had value and, if so, what its value might be. (Ronald Johnson testimony.) Plaintiffs had the opportunity to offer stronger and more persuasive evidence regarding the effect of the lease and the value of the property, in the form of an opinion from their own expert, but chose not to do so. It is therefore presumed that Johnson's opinion, if offered, would not support Plaintiff's argument. Mont. Code Ann. § 26-1-602 (6).

34. The Kafkas acquired the property on which the License 626 shooter operation was conducted in a series of three transactions, two of which occurred in 1993 and the third of which was finalized by a deed executed in February of 2003. (Kim Kafka testimony; Pls.' Ex. I, J, and K.) The land has substantial economic

value even if it cannot be used for game farm purposes. The testimony of Defendants' expert, Ed Jackson, is the only evidence in the record regarding the value of the land. The land's highest and best use is as "rangeland with recreational influences, used for the production of livestock and a potential homesite," and the value of the land, even under the restrictions imposed by I-143 as of November 7, 2000, is $336,000. (Ed Jackson testimony; Defs.' Ex. 5 at 37.)

35. Plaintiff's [sic] attempted to impeach Jackson's opinion by reference to the fact that the deeds contain what Plaintiffs' counsel referred to as "agricultural covenants," clauses that provide: "Grantor certifies that the purpose of Deed is to create a parcel of land to be used exclusively for agricultural purposes pursuant to Section 76-3-207(1)." The Court finds that these clauses provide no basis to challenge Jackson's opinions.

36. As a legal matter, the presence of these "covenants" in these deeds is, to say the least, curious. Montana Code Annotated § 76-3-207, referred to in the "covenants," creates a number of exceptions to the requirement that transactions that create "subdivisions" undergo local government review. By definition, a "subdivision" is a parcel of fewer than 160 acres. Mont. Code Ann. § 76-3-104. All three of these deeds created parcels of more than 160 acres, and all three transactions were therefore exempt from local subdivision review without reference to Mont. Code Ann. § 76-3-207(1).

37. In addition, even taken at face value the "covenants" do not permanently restrict any activity on the subject parcels. Mont. Code Ann. § 76-3-207(1)(c) provides that the covenants are revocable through the mutual consent of the local governing body and the owner. Given that the "covenants" served no useful purpose in these deeds in any event, the Court will not assume that the local government's consent to construction of a home on the subject properties would be unreasonably withheld.

38. Plaintiffs called their own certified appraiser, Ronald Johnson, as a witness, and he offered no testimony to suggest that such covenants affect the marketability of the property for the purposes identified by Jackson as the highest and best use and, because he did not appraise the property himself, could offer no competing opinion as to whether the land had value and, if so, what its value might be. (Ronald Johnson testimony.) Plaintiffs had the opportunity to offer stronger and more persuasive evidence regarding the effect of the covenants and the value of the property, in the form of an opinion from their own expert, but chose not to do so. It is therefore presumed that Johnson's opinion, if offered, would not support Plaintiff's argument. Mont. Code Ann. § 26-1-602 (6).

39. The Court has taken judicial notice that with respect to the property conveyed in Plaintiffs' Exhibit J, the "covenant" has already been lifted through an agreement entered between Kim and Cindy Kafka and Hill County on March 29, 2004,

some seven weeks before trial of this matter. In the Agreement, the Kafkas conceded that the "covenant" was "unnecessary" in deeds conveying parcels of more than 160 acres, and Hill County agreed to release all of the land conveyed in Plaintiffs' Exhibit J from the covenant. The covenants are not listed in the title report as encumbrances on the title. (Defs.' Ex. 5.) Plaintiffs have offered no reason to believe that these clauses would interfere with the use or marketing of the license 626 property as "rangeland with recreational influences, used for the production of livestock and a potential homesite," and the Court finds as fact that no such interference would occur. Accordingly, the Court does not find that the failure to address the "covenants" impairs the credibility of Jackson's report or conclusions.

40. Plaintiffs did offer the opinion of Ronald Johnson that the highest and best use of the lands was for the operation of the Kafkas' game farm. (Ronald Johnson testimony.) Three certified property appraisers (Johnson, Jackson, and Hoeger) testified at trial, and it was their unanimous testimony that as a matter of professional appraisal practice a use had to be "legally permissible" to be considered the highest and best use of land. Johnson agreed that these standards, called the "Uniform Standards for Professional Appraisal Practice" or "USPAP," governed the professional practice of appraisers under Montana law. (Ronald Johnson testimony.) However, Johnson testified that while he opined that the value of the Kafkas' business was $0, this was not an opinion of

value or an appraisal to which the USPAP standards applied. He admitted that he did not follow the procedures required by USPAP in reaching his opinions. (Johnson testimony.)

41 After I-143, fee-shooting on the subject lands was not legally permissible, but Johnson nevertheless opined that the Kafkas' fee-shooting operation was the highest and best use of the lands. For the reasons stated above, the Court rejects Johnson's opinion and finds as fact that the use of the lands for fee-shooting purposes could not be the highest and best use according to the governing standards for professional appraisal practice.

Bridgewater Alternative
Livestock Ranch Operations

42. The Bridgewaters purchased the property on which their game farm is located in Broadwater County in 1990 for $415,000. (Defs.' Ex. 6 at 20.) They did not initially invest in the land, improvements, and fixtures with the purpose of operating a game farm. Jack Bridgewater considered various ideas for how to use the land after they purchased it, and concluded that a game farm would be a profitable use. (Jack Bridgewater testimony.)

43. The Bridgewaters operated their shooter operation after they received their initial license in 1992. While the business generated cash flow in excess of $1.1 million during the period from 1993 through 2000, the Bridgewaters never reported a

profit for tax purposes. (Jack Bridgewater testimony; Defs.' Ex. 22.)

44. The Bridgewaters' licenses have contained the same provisions limiting their activities to those allowed by law as are found the Kafkas' licenses as set forth in Finding of Fact 14.

45. The Bridgewaters were also on notice of their obligation to follow the laws as they may be amended from time to time through the decision document on a 20-acre expansion of their operation approved by DFWP July 9, 1999. The decision document contains the same language quoted from the Kafkas' decision document in Finding of Fact 15. (Defs.' Ex. 14 at 1.)

46. For several years prior to the enactment of I-143, the Bridgewaters harvested and marketed antlers from their shooter bulls for the velvet market. They ceased this practice due to market conditions, not because of anything related to I-143. (Bridgewater testimony.)

47. The Bridgewaters invested significant sums of money in their game farm business. However, their operation is debt-free. (Bridgewater testimony.)

48. Initiative 143 ended the Bridgewaters' fee-shooting operation by making it illegal for them to permit clients to shoot game farm animals for a fee or other remuneration on their game farm. (Gilbert testimony, Pls.-Intervenors' Ex. 1.)

49. I-143 did not eliminate all markets for the Bridgewaters' shooter bulls. They have negotiated a sale of some 160-bull elk to an interest in Colorado. They have received in excess of $80,000 for these elk so far, and are owed more under the contract, although disputes have arisen between the Bridgewaters and the buyers. They have bartered all of their cows and calves to an interest in Idaho in exchange for the right to pasture bull elk in Idaho and bring clients in to shoot them for a fee. This arrangement has yet to produce any income, but a number of the Bridgewaters' bulls are currently pastured in Idaho pursuant to this arrangement. (Bridgewater testimony.)

50. Jack Bridgewater continues to explore other out-of-state markets for his bulls. He has been able to cover the costs of marketing and transportation for the animals he has shipped to out-of-state interests. Thus far none of these efforts have generated sufficient cash flow to be profitable. (Bridgewater testimony.)

51. The testimony of Defendants' expert, Dennis Hoeger, is the only evidence in the record regarding the value of the real property on which the Bridgewaters operate their game farm. The Bridgewaters offered no testimony as to the value of the land and fixtures or of its highest and best use. Their expert, John Gilbert, specifically denied having appraised any tangible real or personal property and did not testify to any opinion as to the highest and best use of the land. (John Gilbert testimony.) The land's highest and best use is as "a recreational ranch," and the value of the land, improvements, and fixtures as of November 7,

2000, is $945,000. (Dennis Hoeger testimony; Defs.' Ex. 6 at 42.) This represents a roughly 100% appreciation in the value of the land, improvements and fixtures since the Bridgewaters acquired them in 1990.

52. Dennis Hoeger's opinion as to the highest and best use is not subject to criticism because he did not consider the fee-shooting operation the highest and best use, for the reasons explained in Findings of Fact 40 and 41.

Bouma Alternative
Livestock Ranch Operations

53. The Boumas operate their game farm on three parcels of land near Chouteau, Montana. Two of the lots are smaller parcels referred to as the "Yeager lots." The Boumas purchased them in 1996 for $55,700. The Boumas acquired the third parcel used in their game farm, totaling 126.777 acres in December 1999 as part of a larger purchase of 258.067 acres for $325,000. (Defs.' Ex. 7 at 18.)

54. The Boumas purchased the land with the intent to enter into the game farm business. They entered the game farm business with the intent to operate a breeder facility to market large shooter bulls to other game farms in other states and Montana that operate fee-shooting businesses. (Jim Bouma testimony.)

55. The Boumas received their initial game farm license in May 1997. (Defs.' Ex. 15.) They acquired some breeding stock and began their operation. (Jim Bouma testimony.)

56. The Boumas' licenses have contained the same provisions limiting their activities to those allowed by law as are found in the Kafkas' licenses as set forth in Finding of Fact 14. (Defs.' Ex. 27.)

57. In March 2000, the Boumas applied to expand their operation to include the 129+ acres acquired the previous December. On August 30, 2000, DFWP issued its decision to approve the expansion. (Defs.' Ex. 16.)

58. Both decision documents include the language pertaining to their obligation to comply with the laws and regulations as they may evolve over the time the license is in effect, as quoted in Finding of Fact 15. (*Id.* at 4; Defs.' Ex. 15 at 2.) The Boumas were accordingly on notice that the regulatory conditions under which they could operate might change.

59. Because it takes several years to raise an elk calf to the point that it can be sold as a shooter animal, the Boumas never sold significant numbers of elk prior to the effective date of I-143. Jim Bouma did recall selling some elk to out-of-state buyers prior to I-143, but did not recall whether he had sold any in state. (Bouma testimony.) The Boumas' alternative livestock business never generated a taxable profit. (Defs.' Ex. 23.)

60. I-143 eliminated the in-state market for the Boumas' shooter bulls. (Gilbert testimony; Pls.-Intervenors' Ex. 1.)

61. I-143 did not eliminate the out-of-state market. Jim Bouma is aware that the ability to ship elk to out-of-state markets depends on satisfaction of the receiving state's requirements for disease surveillance. He has been CWD free under Montana's surveillance program. Thus far, his efforts to market to out-of-state buyers have consisted of a few phone calls. (Jim Bouma testimony; Tim Feldner testimony.)

62. Plaintiff's expert John Gilbert did not testify that the effect of I-143 had eliminated any opportunity to market the Boumas' elk outside the state of Montana. His report and testimony show that he did not evaluate the extent to which the Boumas could profitably market to out-of-state interests. (Pls.-Intervenors' Ex. 1; Gilbert testimony.)

63. The testimony of Defendants' expert, Dennis Hoeger, is the only evidence in the record regarding the value of the land on which the Boumas operate their game farm. The Boumas offered no testimony as to the value of the land and fixtures or of its highest and best use. Their expert, John Gilbert, specifically denied having appraised any tangible real or personal property and did not testify to any opinion as to the highest and best use of the land. (John Gilbert testimony.) The land's highest and best use is for "agricultural production with the potential for future development for industrial or rural residential use,"

and the value of the land, improvements and fixtures is $258,000 – $87,000 for the two Yeager lots and $171,000 for the third tract acquired as part of the larger tract purchased in December 1999. (Dennis Hoeger testimony; Defs.' Ex. 6 at 42.) This represents a roughly 54% appreciation in the value of the land, improvements and fixtures on the two Yeager lots between the time the Boumas acquired them in 1996 and the appraisal date of November 7, 2000. Assuming a per acre value of $1,259.36 for the purchase of the larger tract in December, 2000 ($325,000 divided by 258.067 acres), Hoeger's valuation represents a 7% appreciation in the value of the portion of the larger tract devoted to the game farm between the date of its purchase in December 1999, and the valuation date of November 7, 2000.

Additional Facts Relating to Taking Analysis

64. Both of Plaintiffs' and Plaintiff-Intervenors' experts opined that I-143 had resulted in a taking of the licenses of the Kafkas' and Bridgewaters' fee-shooting operations by removing the ability to engage in the only activity that could result in a profit for their businesses. However, neither John Gilbert nor Ronald Johnson was instructed by counsel about any legal standard to apply in concluding that a taking had occurred.

65. Ronald Johnson admitted that he received no guidance from counsel about what the legal standards were, and that his opinion was based on

his own understanding of what a taking was as an economic, and not a legal matter. He believed that anything that reduced the value of a business was a taking that entitled the business owner to compensation in proportion to the reduction. (Ronald Johnson testimony.) His opinion that the license was taken is legally baseless, and the Court gives it no credit.

66. John Gilbert testified that counsel instructed him that a taking could be found if a regulation deprived property of all economically beneficial or productive use, if the *Penn Central* balancing factors weigh in favor of a taking, or "when a regulation interferes with the right to use property." (John Gilbert testimony; Pls.-Intervenor's Ex. 1 at 2.) He testified that he had reviewed some information regarding the case and had concluded that a taking had probably occurred before he received any of these legal instructions from counsel. After being impeached with his deposition, he admitted that he had testified under oath in deposition that as an expert in his field he would not have felt comfortable stating an opinion on the taking question without first receiving guidance from counsel about the governing legal standards. (John Gilbert testimony.)

67. The rule that a regulation is a categorical taking if it deprives property of all economically viable use applies only to alleged takings of land. Conclusions of Law 23-25. Gilbert erred to the extent he applied it to form an opinion that I-143 took the Plaintiffs' licenses. Gilbert never explained how he had balanced and applied the *Penn Central* factors,

either in his report or in his testimony at trial. Finally, the supposed rule that any regulation that interferes with a use of property is a taking is simply wrong, as many Supreme Court cases have held, starting with the touchstone of regulatory taking jurisprudence, *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922) ("Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.")

68. Plaintiffs showed a significant economic impact on their game farm businesses from the effects of I-143. The initiative eliminated the revenue stream that the Kafkas had projected to retire certain debt. In reliance on that projected revenue stream, they restructured their finances and eliminated or changed other features of their agricultural operation, decisions which may be difficult for them to undo in the wake of I-143. To effectuate the aggressive business plan they chose, they made certain decisions about their business that have unfavorable consequences in the absence of their fee-shooting operation, including the need to retire substantial debt as a result of the restructuring of their finances. (Kim Kafka testimony, John Gilbert testimony, Ronald Johnson testimony, Charles Celania testimony (Defs.' Ex. 17).) As noted above, the Kafkas made these decisions knowing that game farming was a controversial business, knowing that the regulatory framework may change, and, with respect to their investments and changes made in 2000, knowing that I-143 was

under consideration by Montana voters. Findings of Fact 8, 14, 15, 21-26.

69. The initiative had less significant effects on the Bridgewaters. Like the Kafkas, they knew or should have known that game farming was a controversial business and that they were obligated to comply with the governing laws, even if they changed. Findings of Fact 44-45. Their operation was debt-free prior to I-143 and remains so today. Finding of Fact 47. I-143 eliminated their ability to market their elk for fee-shooting purposes in the manner they had chosen prior to the enactment of the new law, forcing them to seek alternative and thus-far less lucrative markets for their stock. They have cut their elk herd in half, and plan to liquidate their inventory and sell their ranch. (Bridgewater testimony; Gilbert testimony.)

70. I-143 has had no direct impact on the Boumas operation, since they never entered the business with the intent to engage in fee-shooting. It has affected their business indirectly by forcing them to find other markets for their shooter bull stock. Thus far they have been unsuccessful in developing a profitable market out-of-state. Like the Kailas, they knew or should have known that game farming was a controversial business and that they were obligated to comply with the governing laws, even if they changed. Findings of Fact 44-45. (Jim Bouma testimony; John Gilbert testimony.)

71. Plaintiffs' experts identified no pre-I-143 secondary market for game farm licenses similar to that which exists, for example, under the liquor license quota system. (John Gilbert testimony.) The record is devoid of any evidence that any game farm licenses were bought or sold prior to the enactment of I-143. Both John Gilbert and Ronald Johnson testified that the licenses for the shooter facilities were now devoid of value, but they based that conclusion primarily on the subordinate opinion that the fee-shooting ban had destroyed the ability to profit from the licensed business, and not on the transfer ban per se. Finding of Fact 60. Neither Gilbert nor Johnson testified that the licenses had any market value independent of the game farm business prior to the enactment of I-143.

72. Plaintiffs have conceded that the game farming industry in Montana is pervasively regulated. (Defs.' Ex. 3, 4.) In fact, when confronted with concerns regarding the possible environmental impacts of their industry, game farmers and their supporters routinely assert that the extensive degree of regulation of their industry mitigates any concerns. *See, e.g.,* Pls.' Ex. A-6 at 17, Comment 13 ("Montana has best regulatory animal identification and herd monitoring system"); Comment 14 ("Disease issue is well-regulated"); *id.* at 17, Comment 15 ("game farm . . . is well-regulated"); Comment 19 ("Game farm, industry is heavily regulated"); *id.* at 22, Comment 35 ("elk are highly regulated").

73. The State introduced unrebutted evidence that I-143 advances substantial state interests. This Court has already held that the State's interests in protecting wild game populations from the spread of disease and hybridization are important state interests. Order on Motion to Dismiss at 4. Game farms are associated with the spread of disease and the potential for interbreeding between captive and wild populations. (Tim Feldner testimony.) The State also has a legitimate interest in promoting its hunting heritage and protecting the sport of hunting. Order on Motion to Dismiss at 5-6. Fee shooting contributes to a bankrupt image of the sport of hunting that has substantial potential to undercut Montana's hunting heritage and the sport of hunting. This potential threatens the State's protection of wildlife populations because sport hunting is the major tool used for control of wild game populations and provides substantial revenues through license fees collected from hunters and matching funds provided by the federal government. (James Posewitz testimony.)

From the facts as found above, the Court draws the following

CONCLUSIONS OF LAW

1. This action involves a claim for damages for the alleged uncompensated taking of property of the Plaintiffs and the Plaintiff-Intervenors. Some of the claims arise from the operation of the Kafka's

alternative livestock ranch in Hill County, as alleged in Count V of Plaintiffs' Complaint. Finding of Fact 1. This Court has jurisdiction over the subject matter, Mont. Code Ann. § 3-5-302(3) and the parties, Mont. R. Civ. P. 12(h), and venue is proper in this county, Mont. Code Aim. §§ 25-2-115, -123, -126.

2. This Court has previously entered its order dismissing Counts I-IV. VI and VII of the Kafkas' Complaint for failure to state a claim upon which relief could be granted. By subsequent Order the Court made those rulings binding on the Plaintiff-Intervenors as the law of the case. The Court by this reference incorporates as conclusions of law its Order on Motion to Dismiss as though set forth here in full.

3. The Fifth Amendment to the United States Constitution provides in part: "[N]or shall private property be taken for public use without just compensation." Article II, § 29 of the Montana Constitution provides in part: "Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner." Plaintiffs have conceded that analysis under the Montana Constitution does not differ from that under the Fifth Amendment, Plaintiffs' Prehearing Brief at 13 n.5, and Plaintiff-Intervenors have adopted by reference the arguments submitted by Plaintiffs, adding nothing of their own by way of legal analysis. Accordingly, this Court concludes for purposes of this case that the Plaintiffs and Plaintiff-Intervenors have waived any claim that the Montana Constitution

provides greater protection in regulatory taking claims than does the Fifth Amendment.

4. The burden of proof with respect to the elements of a regulatory taking claim rests with the Plaintiffs and Plaintiff Intervenors. *Lucas v. S. C. Coastal Council,* 505 U.S. 1003, 1016 n.6 (1992) (Plaintiff "had to do more than simply file a lawsuit to establish his constitutional entitlement; he had to show that the [statute] denied him economically beneficial use of his land."); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 485 (1987) (taking claim rejected because Plaintiffs "have not satisfied their burden of showing that the [statute] constitutes a taking.") Plaintiffs appear to concede in their prehearing brief that they bear the burden of proof. (Pls.' Prehearing Br. at 9 n.3.) ("'The burden of proof in a takings case is one of persuading the Court it is more likely true than not that there remains no economically viable use of the property.'" (citation omitted)); *id.* at 14 ("Under the economic impact prong of the *Penn Central* test, Kafkas must show serious financial loss from the regulatory imposition."); *id.* at 17 (investment-backed expectation element "limits takings recoveries to those property owners who demonstrate they invested in their property in reliance on a state of affairs that did not include the challenged regulatory regime."). Leaving aside the substantive elements of proof discussed in the portions of Plaintiffs' brief referenced above, Plaintiffs clearly acknowledge that the burden of proof rests with them. Accordingly, the Court concludes Plaintiffs

bear the burden of proof with respect to all contested issues in this matter.

5. The State has waived its immunity from suit in Montana state court to recover damages required by the Fifth Amendment for an uncompensated taking of property. *See, e.g., Adams v. Department of Highways,* 230 Mont. 393, 753 P.2d 846 (1988).

6. Prior to the enactment of I-143, fee-shooting of game farm elk was allowed by statute pursuant to the stringent license restrictions then provided by law, Mont. Code Ann. § 87-4-414(2) (1999), and game farm licenses could be transferred if the transferee met the requirements for initial licensure under Mont. Code Ann. § 87-4-426(1) (1999) and certain other conditions were met. Mont. Code Ann. § 87-4-412(2) (1999).

7. I-143 enacted two changes in the statutes that gave rise to this lawsuit. It enacted an amendment to Mont. Code Aim. § 87-4-414(2) to make it read as follows, with the new language italicized in bold:

> (2) The licensee may acquire, breed, grow, keep, pursue, handle, harvest, use, sell, or dispose of the alternative livestock and their progeny in any quantity and at any time of year as long as the licensee complies with the requirements of this part, ***except that the licensee may not allow the shooting of game animals or alternative livestock, as defined in 87-2-101 or 87-4-406, or of any exotic big game species for a fee or***

other remuneration on an alternative livestock facility.

It also amended Mont. Code Ann. § 87-4-412(2) by deleting the existing language regarding transfer and substituting the following: "An alternative livestock ranch license for a specific facility is not transferable." These changes outlaw fee-shooting of game farm animals, and preclude the sale of licenses.

Transfer Ban

8. While Plaintiffs attempt to mount a taking claim with respect to the transfer ban provision of I-143, the Court finds that this claim stands or falls with the claim regarding the ban on fee-shooting.

9. A game farm license is not property that can be the subject of a regulatory taking claim. Conclusions of Law 12-14. Transferability is not an inherent attribute of a license granted by the State. In fact, game farm licenses were not transferable by law prior to a change enacted by the legislature in 1993. Mont. Code Ann. § 87-4-412 (1991), *amended by* 1993 Mont. Laws, ch. 315, § 6. For the reasons explained in Conclusions of Law 13, 14 and 40, the State need not pay compensation to change its regulations of a highly regulated industry or to remove an attribute of the privilege of operating a game farm that it had previously granted. Thus, a claim that the transfer ban impairs a property right in the license fails as a matter of law.

10. Plaintiffs produced no persuasive evidence to show that the ban on sale of a license inflicts any injury to their property rights over and above that which they allege occurs as a result of the fee-shooting ban. No market existed prior to I-143 on which licenses were bought or sold, and accordingly there is no evidence that transferability was ever an element of value for a game farm license. Finding of Fact 71.

Claims Related to Alleged Taking of Licenses

11. This Court has previously held that the game farm licenses held by the Plaintiffs are not vested property rights, but rather privileges granted by the State. The Court stated:

> A "license" is distinguishable from that of a "vested right." A license is revocable. "A right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of the existing general laws."
>
> Here, Plaintiffs have an alternative livestock/game farm license. It is a privilege rather than a right. As a result, it is subject to revocation and/or regulation by the State. The State has changed its laws regarding game farms. That is the State's prerogative. "[T]here is and can be no vested right in an

> existing law so as to preclude its change or repeal."

Order on Motion to Dismiss at 6, *quoting* 16B Am. Jur. 2d Const. Law, §§ 701, 702 (1998). This holding is the law of the case. Conclusion of Law 2. The Montana Supreme Court has expressly extended this rationale to game farm licenses. *Wallace v. Mont. Dep't of Fish, Wildlife, and Parks,* 269 Mont. 364, 368, 889 P.2d 817, 820 (1995), *quoting* 4 Stein, Mitchell, Mezines, Administrative Law, § 41.01 (1994) ("A license is a grant by a government authority or agency of the right to engage in conduct that would be improper without such a grant. The conferment of a license . . . is merely a privilege. . . ."). Contrary to Plaintiffs' position, *Wallace* does not establish an automatic right or vested interest in a game farm license in Montana. *Wallace* at p. 369.

12. Plaintiffs have cited no case in which a court has found that a regulatory taking of a license similar to the game farm licenses at issue here occurred as a result of the enactment of new regulatory requirements that made the licensed business less profitable than it had been prior to the new regulations. Cases holding that due process protections attach to license revocations are not helpful, since it is established that interests protected by the Due Process Clauses of the Fifth or Fourteenth Amendments are not necessarily also protected by the Taking Clause. *Corn v. City of Lauderdale Lakes,* 95 F.3d 1066, 1075 (11th Cir. 1996), *cert. denied,* 522 U.S. 981 (1997) (right to complete construction project not

property under Taking Clause); *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995), *cert. denied,* 517 U.S. 1243 (1996) (teacher tenure not property under the Taking Clause).

13. This Court's holding that the licenses at issue here are privileges and not vested rights is dispositive. A license that is subject to revocation or modification is not property protected by the Taking Clause. State law determines the conditions under which the license may be exercised, and no person has a vested interest in the continuation of the provisions of state law that make a licensed business profitable. When state law creates the privilege of holding a license to engage in a heavily regulated business like game farming is in Montana, *see* Conclusions of Law 11, 35-38, it need not pay compensation when it changes the conditions under which that privilege may be exercised. *Conti v. United States,* 291 F.3d 1334, 1340 (Fed. Cir. 2002), *cert. denied,* 537 U.S. 1112 (2003) (revocation of gillnetting permit not a taking); *Allied-General Nuclear Services v. United States,* 839 F.2d 1572, 1577 (Fed. Cir.), *cert. denied,* 488 U.S. 819 (1988) (refusal to process construction permit for nuclear plant not a taking). The Court of Claims decision, relied on heavily by Plaintiffs, has been overturned. *American Pelagic Fishing Company, L.P. v. U.S.*, 2004 U.S. app. LEXIS 16709 (2004). While the Court of Claims found a taking of American Pelagic's fishing vessel, that conclusion was reversed by the Court of Appeals. Further, it confirmed " . . . that American Pelagic did

not and could not possess a property interest in its fishery permits and authorization letter." *Id.* at p. 26.

14. The Taking Clause has been interpreted by the United States Supreme Court in *Lucas* to protect those interests in property that were elements of ownership of the property at common law. *Lucas,* 505 U.S. at 1027-31. At common law, ownership of land did not carry with it the right to own wild game species. To the contrary, such species were ferae naturae and their ownership was in the sovereign or in the people in common and was always considered subject to "the authority of the law-giving power." *Geer v. Connecticut,* 161 U.S. 519, 522-28 (1896), *overruled on other grounds, Hughes v. Oklahoma,* 441 U.S. 322, 325 (1979). As the Montana Supreme Court explained *Rosenfeld v. Jakways,* 67 Mont. 558, 562, 216 P. 776, 777 (1923):

> That the ownership of wild animals is in the state, held by it in its sovereign capacity for the use and benefit of the people generally, and that neither such animals nor parts thereof are subject to private ownership, except in so far as the state may choose to make them so, are principles now too firmly established to be open to controversy.

For this reason, the operation of game farms in Montana did not become lawful until the legislature first passed a statute allowing it in 1917:

> It shall hereafter be lawful for any person to engage in the business or occupation of stocking, capturing, raising and owning any

> of the wild animals or wild birds of the State of Montana in a wholly enclosed preserve . . . under such rules and regulations as may be prescribed by the State Fish and Game Commission . . . upon paying to the State an annual license fee . . .

1917 Mont. Laws, Ch. 173, § 84. While the view that the sovereign "owns" game animals has changed, *Hughes,* 441 U.S. at 325, it remains the law that the privilege of private ownership of such animals is a matter of legislative grace, not a vested property right. Plaintiffs' game farm licenses exist as legislatively created exceptions to limitations on their uses of land that would have existed at common law. The State need not pay compensation to revoke its permission to engage in a business that would not have been permissible without its permission previously given.

Claims Related to Alleged Taking of Intangible Interests in Business

15. An intangible interest in a business has never been held to be a proper subject of a regulatory taking claim. To the contrary, courts have consistently held that "damages for the loss of goodwill or loss of the going-concern value of a business are not compensable unless the government has condemned the business property with the intention of carrying on the business." *United States v. 0.88 Acres,* 670 F. Supp. 210, 211 (W.D. Mich. 1987).

16. Courts have not viewed a business as the property subject to a taking claim. Rather, they have viewed the ability to carry on a business as one of the elements of an interest in other property such as real estate or goods. One probable reason for this view is that, as Plaintiffs' experts appear to believe, the only basis for valuing the damages arising from a taking of the business would revolve around estimation of future profitability of the business.

17. *Andrus v. Allard,* 444 U.S. 51 (1979), highlights the fundamental practical problem that would arise if the Court were to accept Plaintiffs' claim that their intangible property interest in their business has been the subject of an uncompensated taking.

> [L]oss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a taking claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform.

Allard, 444 U.S. at 66-67. Plaintiffs have produced no evidence to show that their game farms have ever produced a taxable profit, Findings of Fact 17, 43, 59, and Plaintiffs never explain how the Court would go about valuing their damages if it were to accept the premise that they could recover for a "taking" of their business. On what basis would some amount of future profit be assumed? For how many years would the Court assume that the business would continue to

operate profitably? Into perpetuity? Without some end point for the lost profit claim, how would the jury reduce the damages to present value? How would the Court guard against providing Plaintiffs with a windfall in the event that some intervening market force, such as a widespread outbreak of CWD in Montana game farms, eliminated or limited Plaintiffs' hypothetical future fee-shooting market, in much the same way that cattle markets were affected by the recent discovery of mad cow disease in domestic cattle?

18. Since no case has been cited for the proposition that loss of future business opportunity is a compensable property interest under the Fifth Amendment, Plaintiffs are able to cite no case law providing guidance on these difficult questions. For these reasons, courts in taking cases have routinely held that taking damages cannot be awarded for lost future profits of a business. *See, e.g., Rose Acre Farms, Inc. v. United States*, 55 Fed. Cl. 643, 663 (2003) (injuries from the "destruction of the business [or] the frustration of contract or business" are not compensable under the Fifth Amendment, even if they flow from a taking that has been found to occur with respect to the property on which the business operates).

19. The Court's observation that game farming is not a permissible use of land under the common law, Conclusion of Law 14, applies to Plaintiffs' claims with respect to their intangible business interests as well. The ability to operate this business was never

part of the common law property right that inhered in their lands. The State does not owe compensation for injury to the value of a business that exists only because the legislature has allowed it.

20. An intangible interest in a business is not property for which compensation may be claimed under the Fifth Amendment. Plaintiffs' claims for the alleged taking of their businesses fail as a matter of law. While the Court does not dispute Plaintiffs' assertion that its business and goodwill are "property" under Montana law, the mere label does not make it property subject to compensation.

Categorical Taking

21. The Kafkas claim that I-143 caused a "categorical taking" of their business, licenses, real property, and alternative livestock, and, in the alternative, that the initiative caused a "regulatory taking" of the same property under the balancing test described in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). It is clear the Bridgewaters' and Boumas' claims are no broader than those asserted by the Kafkas. Thus, the Court will resolve the categorical taking claims with respect to Plaintiffs' land and personal property first, and then proceed to the *Penn Central* claims.

22. None of the Plaintiffs has satisfied their burden of proof with respect to the categorical taking claim. This claim fails because the categorical taking rule applies only to claims regarding takings of land,

and the uncontested evidence in this case shows that Plaintiffs' game farm lands were not taken and they retain significant economic value.

23. Plaintiffs claim that I-143 caused a so-called "categorical taking" because it prevented any profitable use of their game farm licenses and of the businesses associated with the licenses. They thus argue that no balancing of interests is required, and that they are entitled to compensation without application of the *Penn Central* balancing test. Such claims fail for the reasons stated in Conclusions of Law 11-20. But even if Plaintiffs could assert a claim for compensation for the supposed taking of the intangible interests in their licenses and businesses, the claims for a categorical taking of these interests would fail because the categorical taking rule applies only to an alleged regulatory taking of interests in land.

24. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court clarified the law in this area. *Lucas* involved a claim that a statute controlling coastal development effectively rendered the Plaintiffs' coastal land "valueless." Following trial, the South Carolina trial court entered a factual finding that the land was without economic value after the adoption of the statute, a finding that the State did not appeal. The Supreme Court then reviewed the governing principles of law and concluded that a categorical taking has occurred only in the "extraordinary circumstance when *no productive or economically*

beneficial use of land is permitted," 505 U.S. at 1017 (italics the Court's, underlining added).

25. The property interest at stake in *Lucas* was a fee simple estate in land, a real property interest. 505 U.S. at 1017. The Court explicitly distinguished cases like the one at bar, in which the effect of the regulation fell on the commercial viability of a business.

> [I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive value is sale or manufacture for sale). In the case of land, however, we think the notion . . . that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause . . .

505 U.S. at 1027-28 (citations omitted). Following *Lucas,* lower courts have recognized that the categorical taking rule applies only to claimed takings of land. *Unity Real Estate Co. v. Hudson,* 178 F.3d 649, 674 (3rd Cir.), *cert. denied,* 528 U.S. 963 (1999). Plaintiffs have cited no case in which compensation has been awarded under a categorical taking analysis for a regulatory taking of anything other than land. Thus, Plaintiffs can prevail on their categorical

taking claim only if they have proved that I-143 has deprived the land on which they operate their game farms of all economically productive use.

26 Plaintiffs failed to sustain their burden of proof with respect to a claimed categorical taking of their land. Initially, to the extent the Kafkas claim for a taking of the land associated with License 622, their claim fails because they do not own the real estate, but merely lease it. Finding of Fact 30.

27. The Supreme Court has described takings analysis by analogy to a fraction in which the denominator is the value of the land prior to the regulation and the numerator is its value afterward. *See, e.g., Keystone Bituminous Coal Assn.,* 480 U.S. at 497. Plaintiffs produced no evidence for either side of the fraction with respect to their claim that their land has been taken by I-143. They provided no evidence for the value of the land prior to the effective date of I-143, and no evidence for its value after.

28. In any event, as long as the value of the numerator of the fraction is more than 0, a categorical taking claim fails under *Lucas.* Defendants introduced the only evidence of the value of the real property after the enactment of I-143, and in the case of all three Plaintiffs the land retains substantial economic value. Findings of Fact 34, 51, 63. Where land retains substantial economic value, a categorical taking claim fails. *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302, 330 (2002); *quoting Lucas,* 505 U.S. at 1019 (*Lucas* rule

limited to cases of "complete elimination of value"); *Palazzolo v. Rhode Island,* 533 U.S. 606, 631 (2001) ("A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property economically idle.")

Penn Central Balancing

29. The courts have recognized a second category of cases in which a taking may be found even if the regulation at issue has not deprived the owner of all economically viable use of land. Under this analysis, an "ad hoc factual inquiry" may disclose that a particular regulation "goes too far" and constitutes a taking. *Penn. Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978). This decision has given rise to the familiar three-part balancing test in which the courts consider "the economic impact of the regulation on the claimant, . . . the extent to which the regulation has interfered with distinct investment-backed expectations, [and] the character of the government action." *Id.*

30. With respect to Plaintiffs' land, Plaintiffs have shown no economic impact from I-143 at all. For the reasons stated in Conclusion of Law 14, loss of the opportunity to operate a game farm on the land is not an interest compensable under the Fifth Amendment as interpreted in *Lucas.*

31. All of the lands at issue retain substantial economic value. Conclusion of Law 28. In the cases of the Bridgewaters and Boumas, their investments in

the land devoted to their game farms has paid a substantial return, 100% in ten years in the case of the Bridgewaters. Findings of Fact 51, 63. With respect to the Kafkas' License 626 property, they have failed to prove any loss of market value as a result of I-143. While they called an expert appraiser, they did not ask him to appraise the real estate and he denied having done so. In fact, he denied that the land had been taken. Since they had the ability to produce expert testimony as to the effect of I-143 on the value of their real property but chose not to do so, Findings of Fact 38, the Court presumes that their expert's opinion would have been adverse to their position. Mont. Code Ann. § 26-1-602(6).

32. Plaintiffs have shown a significant impact on the value of shooter bull elk arising from the fee-shooting ban enacted in I-143 under current market conditions. Finding of Fact 28.

33. The Kafkas have shown that their pre-I-143 business plan has been frustrated by the enactment of I-143. Finding of Fact 68. However, the fact that a regulatory change may impair a business, or even force it into bankruptcy, is not conclusive evidence that a taking has occurred. As the court observed in *Unity Real Estate Co. v. Hudson,* 178 F.3d 649, 677 (3rd Cir.), *cert. denied,* 528 U.S. 963 (1999), "[t]hat a regulation will put a particular plaintiff out of business cannot be proof that a taking has occurred. Instead, the size of the deprivation inflicted by a law must be evaluated in the context of the other relevant facts." In *Allied-General Nuclear,* the refusal of the

United States to proceed with permit approval caused the loss of a $200 million investment in a partially constructed power plant, but no taking was found. Accordingly, the Court concludes that the economic impact on the Plaintiffs does not conclusively establish that a taking has occurred.

34. Plaintiffs had significant investment-backed expectations, but their subjective expectation of profit must be legally tempered by the objective reality that they were engaged in a highly regulated and speculative new industry. As the Supreme Court has observed:

> [I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive value is sale or manufacture for sale). In the case of land, however, we think the notion . . . that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause. . . .

Lucas, 505 U.S. at 1027.

35. Game farmers and their supporters, including the Kafkas, have admitted that their industry was pervasively regulated to mitigate potential

environmental concerns and risks to wild game populations. Finding of Fact 72. The game farm industry was pervasively regulated in Montana prior to the adoption of I-143.

36. Concerns about CWD had prompted the industry to propose and induce the legislature to pass laws closing the game farm market to new entrants through a moratorium on new game farm licenses until such time as a live test for CWD could be developed. 2000 Mont. Laws, Ch. 1 (May 2000 Spec. Sess.)

37. Prior to the enactment of I-143, the legislature had provided for the establishment of stringent regulations governing licensing and operation of game farms in Montana. Mont. Code Ann. tit. 87, ch. 4, pt. 4 (1999).

38. A negotiated rulemaking process had taken three years to produce a comprehensive set of regulations governing game farms. (Kim Kafka testimony.) These regulations cover fifty sections of the Montana administrative rules, and control virtually every aspect of the game farm business: entry into the market, Mont. Admin. R. §§ 12.6.1522-12.6.1526; fencing of game farm property, *id.* § 12.6.1531-12.6.1536; disposition of escaped game farm animals and wild game that invade game farms, *id.* § 12.6.1538; extensive recordkeeping requirements, including semi-annual reports in which the game farmer must account for every addition to or reduction of the herd, from whatever cause, *id.* § 12.6.1539; identification

requirements, including tattoos and ear tags, *id.* § 32.4.201; mandatory disease inspection, including inspections for disease in connection with any exchange of ownership of a live or dead game farm animal, *id.* §§ 32.4.301, 32.4.401; genetic and disease testing of any animals imported into the state, *id.* §§ 32.4.402, 32.4.601; disease inspection for any animals to be transported within the state, *id.* § 32.4.701; maintenance of quarantine facilities, *id.* §§ 32.4.801-32.4.803; and a comprehensive testing program for CWD, including mandatory submission of brain stem material for CWD testing for every game farm elk over the age of 16 months that dies of any cause, *id.* § 32.4.1301-32.4.1304.

39. Plaintiffs' game farm operations were not a matter of common law use or statutory entitlement. Conclusion of Law 14. They were allowed to conduct their business only so long as they complied with the licensing requirements and regulations. This Court has already found that the game farm license was a privilege, Conclusion of Law 11, and significant deviation from these requirements would provide grounds to revoke their privilege to engage in the business. Mont. Code Ann. § 87-4-423 (1999). As a matter of fact, Plaintiffs were aware that their business was subject to regulatory requirements with which they were obligated to comply, and that these requirements could change. Findings of Fact 14, 15, 44, 45, 56-58.

40. I-143 is nothing more or less than a validly enacted extension of the existing regulations. While

its burdens on the Plaintiffs exceed those of the previously existing regimen, this Court has already held that the initiative is a valid police power regulation that reasonably advances the protection of the health, safety, and welfare of the State and its citizens. Order on Motion to Dismiss at 11. Plaintiffs' game farm operation was always conducted under the possibility that changes in the regulatory structure might alter their expectations regarding the business, and their subjective investment-backed expectations were limited accordingly. "Those who do business in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 [(1958)], *quoted with approval in Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

41. I-143 is a valid exercise of the State's police power. The State has the power to determine that certain commerce is injurious to the welfare of the State and its citizens, and to regulate or even outlaw that commerce. The State has done so here with respect to the fee-shooting prohibition in I-143. When the State does so, its actions may injure investment-backed expectations with respect to commerce in the goods at issue without having to pay compensation. Numerous decisions of the United States Supreme Court and lower courts support this conclusion.

42. In *Allard*, a dealer in Indian artifacts sued the Secretary of the Interior claiming that a statute enacted by Congress limiting commerce in eagle parts

caused a taking of certain feather artifacts he had acquired before the statute's enactment. The Supreme Court rejected the claim, holding:

> It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. . . . [H]owever, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking. In the instant case, it is not clear that appellees will be unable to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admission charge. ***At any rate, loss of future profits – unaccompanied by any physical property restriction – is a slender reed upon which to rest a taking claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform.***

444 U.S. at 66-67 (citations omitted and emphasis added).

43. In a series of cases arising out of prohibition of trade in liquor, the Supreme Court consistently rejected the argument that the government owed the taverns, brewers, and distiller's compensation under the Fifth Amendment for putting them out of business. *Mugler v. Kansas,* 123 U.S. 623, 664-70 (1887) (state statue prohibiting manufacture and sale of liquor did not require compensation to tavern owners for the loss of profitability of their business or the loss of value of their inventory); *see also James*

Everard's Breweries v. Day, 265 U.S. 545, 563 (1924) (statute that prohibited medicinal dispensing of beer held not to take property of brewer and beer distributor). The Supreme Court has repeatedly reaffirmed the vitality of *Mugler* and other cases involving state police power regulations. *See, e.g., Lucas,* 505 U.S. at 1022-26 (distinguishing *Mugler* and related cases because they did not involve elimination of all economically viable use of land); *Keystone Bituminous Coal Ass'n,* 480 U.S. at 491, *quoting Mugler,* 123 U.S. at 668 ("[P]rohibition on use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community cannot, in any sense, be deemed a taking or appropriation of property."); *Allard,* 444 U.S. at 67 (collecting cases). Plaintiffs' argues [sic] that *Western Energy v. Genie,* 227 Mont. 81, 737 P.2d 478 (1987) establishes that Montana has refused to follow *Keystone* and the *Mugler* line of cases. *Western* merely distinguished a regulation based on determination of a nuisance (underground mining in Pennsylvania) and the total elimination of open-pit mining in Montana by a statute requiring the surface owner's consent. *Western* at p. 80-81.

44. Indeed, the police power even extends to protect the government from having to pay compensation when liquor, legally manufactured and possessed prior to prohibition, is declared contraband and seized. In *Samuels v. McCurdy,* 267 U.S. 188 (1925), the Supreme Court held that no compensation was due under the Fifth Amendment for the seizure

of stocks of liquor that were acquired before prohibition but became contraband after adoption of the prohibitory statute. If the actual physical taking of liquor requires no compensation, it is hard to comprehend an argument that a taking occurs under a regulation such as I-143, that does not interfere with Plaintiffs' possession of game farm animals or their ownership, transportation, or sale except insofar as fee-shooting on a Montana game farm is concerned.

45. Lower federal courts continue to apply this analysis in rejecting taking claims arising from regulations that impair the profitability of already highly regulated businesses. In *Mitchell Arms, Inc. v. United States,* 7 F. 3d 212 (Fed. Cir. 1993), *cert. denied,* 511 U.S. 1106 (1994), the Court considered the claim of an arms dealer who entered into a contract for purchase of certain assault rifles for delivery into the United States, a commercial endeavor that would have been allowed under the regulations in effect when the contract was entered and performed. After Mitchell received permits from the Bureau of Alcohol, Tobacco and Firearms for the importation of the assault weapons, the Bureau suspended all importation of assault rifles into the United States. 7 F.3d at 214. Mitchell sued claiming that the contract for the purchase of the weapons was property that had been categorically taken by the Bureau's suspension of imports. *Id.* at 215. The Federal Circuit affirmed the Claims Court's holding that no taking occurred. It reasoned that one who

enters into a heavily regulated commercial environment accepts the risk that changes in government regulation may limit, or even eliminate, their opportunity to make a profit from their business. In such cases, the opportunity to operate a profitable business is not "property" for which a successful taking claim may be brought. The court explained:

> Mitchell's expectation of selling the assault rifles in domestic commerce – the interest affected in this case – was not inherent in its ownership of the rifles. Rather, it was totally dependent upon the import permits issued by ATF. In short, Mitchell's ability to import rifles and sell them in the United States was at all times entirely subject to the exercise of ATF's regulatory power. Consequently, any expectation which arose on Mitchell's part as a result of the import permits did not constitute a property right protected by the Fifth Amendment.

7 F.3d at 17. To the same effect are *Allied-General Nuclear,* in which the court rejected a taking claim arising from termination of a nuclear power plant project in which the builders had invested $200 million because the government decided that threats of terrorist activity had created a risk to national security that required termination of the program, 839 F.2d at 1576-77, and *Conti,* in which the government changed the regulations on swordfish netting in a way that prohibited a fisherman from continuing to make a living in the manner to which he had become accustomed. This position is further supported by the

Court of Appeals decision in *American Pelagic,* where the plaintiff had its fishing boat put out of use for 20 months and received a $37 million award from the Court of Claims. In reversing that decision, the Court of Appeals found a lower expectation of protection from taking for personal property than land. A taking would only occur if the right to use it were taken. *Id.* at p. 34. As there were limits on fishing when the boat was purchased, just as elk farming was controlled when Plaintiffs bought or produced elk, the Court of Appeals found that the revocation of fishing permits did not allow for a claim of a property right, subject to a taking claim, in the boat. *Id.* at p.43.

46. The cases principally relied upon by Plaintiffs are distinguishable. They cite numerous land use and zoning cases that do not apply here because the courts have traditionally accorded substantially less deference to the police power when regulation of land use is involved rather than, as here, where the State chooses to regulate commercial trade in goods and services.

47. *Yancey v. United States,* 915 F.2d 1534 (Fed. Cir. 1990), is also not persuasive in this case. In *Yancey,* the plaintiffs raised turkeys that were caught in an embargo imposed by the federal Animal and Plant Health Inspection Service after an avian flu outbreak. The Yanceys' turkeys were not found to be infected, but the embargo deprived them of the preferred interstate markets for their birds. After selling their flock for substantially less than their usual market would have produced, the Yanceys

brought suit against the government alleging a taking of their property. The Federal Circuit held that the Yanceys were entitled to compensation in large part because they were not the targets of the federal regulation that resulted in the loss of their property-their birds were not diseased.

48. *Yancey* should be distinguished for several reasons, First, the case predates *Lucas* and is of dubious validity in light of the Supreme Court's recognition in that case of the broad authority of the government to regulate commercial activity. Second, the Court in *Yancey* did not discuss the extent to which the turkey market could be deemed "pervasively regulated." Third, raising poultry is an aspect of traditional agricultural practice, not an activity forbidden at common law that may be engaged in only through legislatively granted authority. *Cf.* Conclusion of Law 14. Fourth, in *Yancey* and as in *Allard, Conti* and *Mitchell Arms,* Plaintiffs here are the merchants against whom the regulation was designed to operate. *Yancey's* rule of innocent bystander compensation is inapplicable.

49. The Court is aware of dicta in the Montana Supreme Court's decision in *Adams v. Department of Highways,* 230 Mont. 393, 397, 753 P.2d 846, 849 (1988), to the effect that "it is not a complete defense to an inverse condemnation action for the governmental defendant to claim that it was exercising its police power." That dicta is not applicable here. *Adams* involved an inverse condemnation claim alleging that the value of the plaintiffs' land diminished as a result

of noise and dust when traffic increased due to the construction of a bridge and improvement of a city street. The taking found in that case did not arise from injury to heavily-regulated business from a regulatory statute, but rather from injuries to land from the development of the government's previously acquired right-of-way, a claim akin to an argument that the development of the street was a nuisance. While, as the Court stated in *Adams,* police power arguments do not invariably win the day in taking claims, they are generally successful in cases like the one at bar. *Knight v. Billings,* 197 Mont. 165, 642 P.2d 141 (1982), is of similar import as it declared an inverse condemnation by a city's widening of a street so as to eliminate residents' use of the street for parking and interfere with yard use. *See also Howard v. State of Montana,* 198 Mont 470, 647 P.2d 828 (1992). Plaintiff-Intervenors cite that case to support their takings claim. However, I-143 does not interfere with residential use of land like the firing of howitzers did over plaintiff's in *Howard.*

50. On balance, the *Penn Central* factors weigh heavily against requiring the State to pay compensation here. The economic effect of the initiative on Plaintiffs and their subjective investment backed expectations are outweighed by the third factor, the nature of the government regulation. I-143 substantially advances important state interests. Order on Motion to Dismiss; Findings of Fact 73. It is a valid police power regulation over a commercial venture that exists only as [sic] matter of legislative permission

and has traditionally been subject to extensive state regulation. It does not physically occupy Plaintiffs' land or confiscate their game farm animals. It leaves them free to make other economically viable use of their property, removing only one potential use that has been validly deemed to be injurious to public health, safety, and welfare. Under *Penn Central,* the Plaintiffs are entitled to no compensation under the Taking Clause.

51. The Plaintiff-Intervenors include in their Complaint in Intervention claims for compensation under *Dorwart v. Caraway,* 2002 MT 240, 312 Mont. 1, 58 P.3d 128. *Dorwart* created no new constitutional or common law rights. It merely recognized a remedy in damages for cases in which the Plaintiff proved that he had been injured through a violation of a provision of the Declaration of Rights in the Montana Constitution. This Court has already rejected the argument that I-143 violated the various constitutional provisions cited in paragraph 10 of the Complaint in Intervention as the predicate for the Plaintiff-Intervenors' *Dorwart* claims. Accordingly, the claims provide no basis for an award of damages in this case. For the foregoing reasons, the Court concludes that no taking has occurred as a result of the enactment or enforcement of I-143 for which compensation is due the Plaintiffs under the Fifth Amendment or Article I, section 29 of the Montana Constitution, and that Plaintiff-Intervenors are entitled to no damages under *Dorwart.*

Based on the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

DECREE

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that Plaintiffs' and Plaintiff-Intervenors' Complaints for taking are DENIED. Judgment is entered for Defendant.

DATED this 8th day of February 2005.

/s/ Leaphart
DISTRICT JUDGE

Cc: Attorneys

IN THE SUPREME COURT OF
THE STATE OF MONTANA

05-473

BRUCE BUHMANN, SHIRLEY BUHMANN, CIRCLE EAGLE GAME FARM, LEN WALLACE, PAMELA WALLACE, and BIG VELVET RANCH,

Plaintiffs and Appellants,

vs.

STATE OF MONTANA, MIKE McGRATH, and JEFF HAGENER,

Defendants and Appellees,

SPORTSMEN FOR I-143, MONTANA WILDLIFE FEDERATION,

Defendant-Intervenors, and Appellees.

ORDER

(Filed Feb. 10, 2009)

Before this Court is Appellants' Petition for Rehearing. The Appellees and Intervenors have filed their respective objections to the Petition. The Court having carefully considered the matter, and in accordance with Montana Supreme Court Internal Operating Rules, Section IV(2),

IT IS HEREBY ORDERED that Appellants' Petition for Rehearing is DENIED.

IT IS FURTHER ORDERED that the Clerk of this Court give notice of this Order by mail to counsel of record.

DATED this 10th day of February, 2009.

/s/ Patricia Cotter

/s/ W. William Leaphart

Justices

Hon. Deborah Kim Christopher, sitting for Justice John Warner, would also deny Appellants' Petition for Rehearing.

Justice James C. Nelson, Justice Jim Rice, and Hon. W. Nels Swandal, sitting for Justice Brian Morris, would grant Appellants' Petition for Rehearing.

IN THE SUPREME COURT OF
THE STATE OF MONTANA

05-146

KIM J. KAFKA and CINDY R. KAFKA, Individually and as Husband and Wife; and as members of DIAMOND K RANCH ENTERPRISES LLC, a Montana Limited Liability Company,

Plaintiffs and Appellants,

and

JACK BRIDGEWATER and MYRA BRIDGEWATER, Individually and as members of PHANTOM BULL ELK RANCH LLC, and JIM BOUMA and BARBARA BOUMA,

Plaintiff-Intervenors and Appellants,

v.

THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS, and THE STATE OF MONTANA,

Defendants and Appellees,

ORDER

(Filed Feb. 10, 2009)

and

SPORTSMEN FOR I-143,
MONTANA WILDLIFE
FEDERATION,
Defendant-Intervenors,
and Appellees.

Before this Court is the Appellants' Joint Petition for Rehearing. The Appellees and Intervenors have filed their respective objections to the Petition. The Court having carefully considered the matter, and in accordance with Montana Supreme Court Internal Operating Rules Section IV(2),

IT IS HEREBY ORDERED that the Petition for Rehearing is DENIED.

IT IS FURTHER ORDERED that the Clerk of this Court give notice of this Order by mail to counsel of record.

DATED this 10th day of February, 2009.

/s/ Patricia Cotter

/s/ W. William Leaphart
Justices

Hon. Deborah Kim Christopher, sitting for Justice John Warner, would also deny the Joint Petition for Rehearing.

Justice James C. Nelson, Justice Jim Rice, and Hon. W. Nels Swandal, sitting for Justice Brian Morris, would grant the Petition for Rehearing.

2000 Voter Information Pamphlet – Pages 77-79
Published by the Montana Secretary of State

The Complete Text of Initiative No. 143 (I-143)

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MONTANA:

Section 1. Section 87-4-407, MCA, is amended to read:

"87-4-407. License required – ~~moratorium~~ – penalty – seizure of illegally possessed animals. (1) A person may not operate an alternative livestock ranch in this state without *having* first ~~obtaining~~ *obtained* an alternative livestock ranch license from the department *prior to [the effective date of this act]. A person may not apply for or be granted a license after that date.* ~~The department may not accept any new applications for an initial alternative livestock ranch license until a live test for chronic wasting disease is developed and is approved by the department of livestock.~~

(2) A person who operates an alternative livestock ranch without a license or possesses, transports, buys, or sells animals whose importation into the state is restricted pursuant to 87-4-424 is guilty of a misdemeanor and is subject to the penalties provided in 87-4-427(4).

(3) Any animal held in violation of subsection (2) or otherwise illegally possessed may be immediately seized by the department and is subject to disposal by

the department. Costs of seizure may be charged to the person in possession of the animal."

Section 2. Section 87-4-408, MCA, is amended to read:

"87-4-408. Jurisdiction. (1) The department has primary jurisdiction over alternative livestock ranches with regard to licensing, reports, recordkeeping, exterior fencing, classification of certain species under 87-4-424, ~~removal of game animals under 87-4-410,~~ unlawful capture under 87-4-418, inspection under 87-4-413, and enforcement of the functions listed in this subsection.

(2) The department of livestock has primary jurisdiction over alternative livestock ranches with regard to marking, inspection, transportation, importation, quarantine, hold orders, interior facilities, health, and enforcement of the functions listed in this subsection."

Section 3. Section 87-4-411, MCA, is amended to read:

"87-4-411. License ~~and~~ renewal fees – deposit of fees. (1) *The* ~~Except as provided in 87-4-407(1), the~~ department shall charge an ~~initial~~ *annual renewal* alternative livestock ranch license fee ~~and an annual renewal fee~~ based on the following scale:

(a) an alternative livestock ranch with 1 to 20 alternative livestock, ~~an initial license fee of $200 and an annual renewal~~ *a* fee of $100;

(b) an alternative livestock ranch with 21 to 60 alternative livestock, ~~an initial license fee of $300 and an annual renewal~~ *a* fee of $200; and

(c) an alternative livestock ranch with more than 60 alternative livestock, ~~an initial license fee of $400 and an annual renewal~~ *a* fee of $400.

~~(2) In addition to the fees assessed under subsection (1), the department shall charge applicants a fee of $4 an acre based on the total number of acres indicated in the application for a license. In cases of an application for a license modification, the fee applies only if an acreage expansion is proposed.~~

~~(3)~~*(2)* The department of livestock shall assess a fee, not to exceed $50, for each alternative livestock imported into the state.

~~(4)~~*(3)* (a) One-half of the fees collected pursuant to subsection (1) ~~and all of the fees collected pursuant to subsection (2)~~ must be deposited in the state special revenue fund for the use of the department for purposes of this part.

(b) One-half of the fees collected pursuant to subsection (1) and all *import* fees collected pursuant to subsection ~~(3)~~ *(2)* must be deposited in the state special revenue fund for the use of the department of livestock for purposes of this part."

Section 4. Section 87-4-412, MCA, is amended to read:

"87-4-412. Term of license – renewal – ~~transferability~~ *transfer prohibited.* (1) An alternative livestock ranch license expires on March 1 of the year succeeding the year of issuance. Application for renewal must be made before a license expires. The department shall renew the license upon payment of the renewal fee if the licensee has complied with all recording and reporting requirements.

(2) An alternative livestock ranch license for a specific facility is *not* transferable ~~with the consent of the department. The department's consent must be given if:~~

~~(a) the transferee meets the requirements of 87-4-426(1);~~

~~(b) the alternative livestock ranch and facilities are in compliance with requirements in place at the time the license was issued;~~

~~(c) the alternative livestock ranch is not under quarantine by the department;~~

~~(d) alternative livestock to be transferred are not prohibited under this part and department rules; and~~

~~(e) the transfer is not proposed as a means to evade a requirement imposed on the licensee.~~"

Section 5. Section 87-4-413, MCA, is amended to read:

"87-4-413. Inspection. ~~(1) Upon receipt of an application for an alternative livestock ranch license, the department shall inspect the land proposed to be covered by the license. (2)~~ The department may inspect the alternative livestock ranch or the licensee's alternative livestock ranch records on a scheduled basis or on another reasonable basis as may be determined necessary."

Section 6. Section 87-4-414, MCA, is amended to read:

"87-4-414. Alternative livestock as private property – source – marking – *fee shooting prohibited.* (1) All alternative livestock lawfully possessed on a licensed alternative livestock ranch are private property for which the licensee is responsible as provided by law.

(2) The licensee may acquire, breed, grow, keep, pursue, handle, harvest, use, sell, or dispose of the alternative livestock and their progeny in any quantity and at any time of year as long as the licensee complies with the requirements of this part, *except that the licensee may not allow the shooting of game animals or alternative livestock, as defined in 87-2-101 or 87-4-406, or of any exotic big game species for a fee or other remuneration on an alternative livestock facility.*

(3) A licensee shall mark alternative livestock in a manner approved by the department of livestock, as required under subsection (4), and that indicates ownership and provides individual identification of animals for inspection, transportation, reporting, and taxation purposes.

(4) The department of livestock is responsible for the control, tracking, and distribution of identification tags used for the marking of alternative livestock. The department of livestock shall require that all imported alternative livestock are marked within 30 days of importation and that all other alternative livestock are marked prior to January 1 of each year. Each alternative livestock must be marked with identification that:

(a) is unique to the animal;

(b) is nontransferable;

(c) has an emblem owned and registered by the department of livestock that is embossed on each identification tag; and

(d) allows for the identification of alternative livestock from a distance.

(5) Upon the request of a licensee, the department of livestock may grant a temporary waiver as to the time for identification and to the manner of identification if necessary to address a special circumstance.

(6) Alternative livestock must be lawfully acquired by the licensee. Alternative livestock may be kept only

on a licensed alternative livestock ranch. A licensee who keeps alternative livestock owned by, leased to, or leased from another person shall comply with all of the requirements of this part as if the animal belonged to the licensee. Records and reports submitted by the licensee pursuant to 87-4-417 must identify any alternative livestock kept by the licensee during the reporting period and the name and address of the owner or lessee.

(7) Except as otherwise provided in this part, laws applicable to game animals do not apply to alternative livestock raised on a licensed alternative livestock ranch."

Section 7. Section 87-4-428, MCA, is amended to read:

"**87-4-428. Right to administrative hearing.** ~~(1) An applicant must be given notice and an opportunity for a hearing on a proposed denial or issuance with stipulations of an alternative livestock ranch license pursuant to 87-4-426 before the department may deny a license or grant a license with stipulations.~~

~~(2)~~*(1)* A licensee must be given notice and an opportunity for a hearing before the department may refuse to renew a license, ~~withhold consent to the transfer of a license,~~ revoke a license, or discipline a licensee.

~~(3)~~*(2)* The notice and an opportunity for a hearing and any judicial appeal must be conducted as provided in Title 2, chapter 4, parts 6 and 7."

Section 8. Section 87-4-433, MCA, is amended to read:

"**87-4-433. Programmatic environmental review.** (1) The department, in cooperation with the department of livestock, shall, by July 1, 2001, conduct a programmatic review of environmental impacts that may be associated with the granting of a license to operate an alternative livestock ranch.

(2) In consultation with the department of livestock, the department shall select a contractor to prepare the programmatic environmental review, which must be in the form of an environmental impact statement.

(3) In addition to the department of livestock, the department shall seek the assistance and participation of other governmental agencies that have special expertise in areas that should be addressed in the programmatic.

~~(4) For an alternative livestock ranch license application that is received after July 1, 2001, the department shall conduct an environmental review, if required, using the programmatic and tiering environmental impacts to the programmatic.~~"

NEW SECTION. **Section 9. Repealer.** Sections 87-4-409, 87-4-410, 87-4-426, and 87-4-431, MCA, are repealed.

NEW SECTION. **Section 10. Severability.** If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the

part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 11. Effective date.** This act is effective upon approval of the electorate.